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NATIONAL SOVEREIGNTY AND INTERNATIONAL ORDER

An Essay upon the International Community and International Order

By

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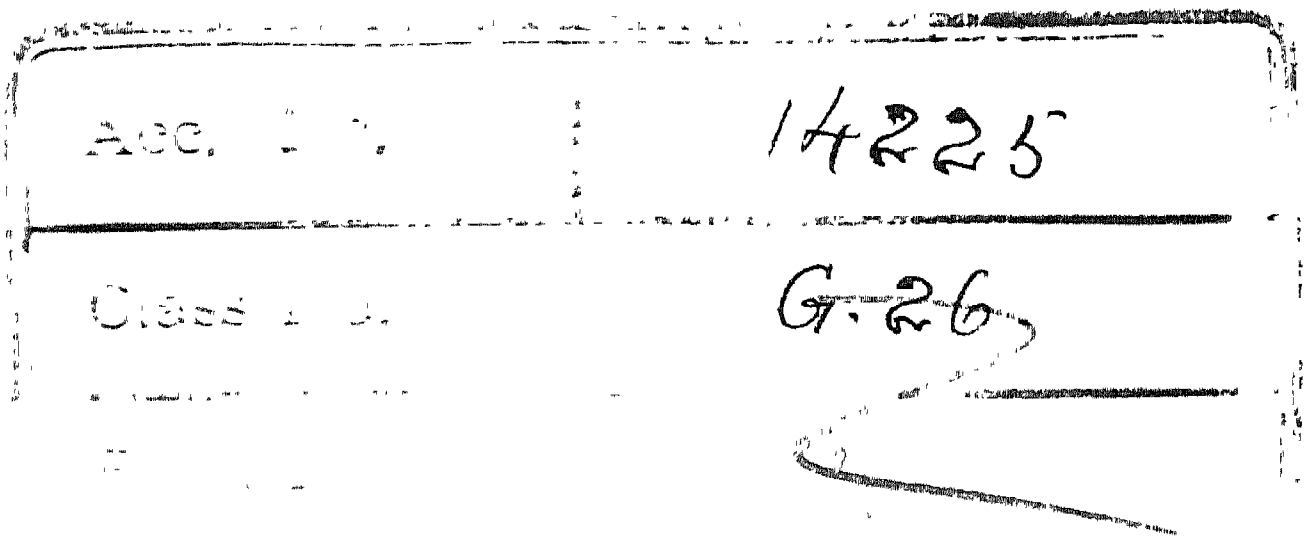

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FOREWORD

PROFESSOR GEORGE W. KEETON, the Director of the New Commonwealth Institute, is so well known in the academic sphere as an authority on international law and relations that he will need no introduction to these circles. The following brief biographical note may nevertheless be of interest to the wider public which this monograph is intended to reach. Professor Keeton was Foundation Scholar in Law at Gonville and Caius College, Cambridge, and from 1924-1927 Reader in Law and Politics at Hong Kong University. In 1928 he went to Manchester, where he spent three years as Senior Lecturer in Law. He now holds the chair of English Law at University College, in the University of London. In addition to his numerous other activities, Professor Keeton is a member of the North China Branch of the Royal Asiatic Society and of the China Social and Political Science Association. He is on the Editorial Boards of the Modern Law Review and of the New Commonwealth Quarterly, and has been Chairman of the New Commonwealth Institute's British Legal Research Committee since the Committee was first established. He is known to students of international law as a writer on Far Eastern Problems, and in particular by his standard monograph on *The Growth of Extra-Territoriality in China* (London, 1927), as well as by frequent contributions to the *Law Quarterly Review*, the *Journal of Comparative Legislation and International Law*, the *Juridical Review*, the *Chinese Social and Political Science Review*, the *British Year Book of International Law*, the *Nineteenth Century* and the *Fortnightly*.

Professor Keeton's other publications include:

The Austinian Theories of Law and Sovereignty (with R. A. Eastwood), 1929.

The Elementary Principles of Jurisprudence, 1930.

Shakespeare and his Legal Problems, 1930.

The Problem of the Moscow Trial, 1933.

The Law of Trusts, first published 1934, 2nd Edition 1937.

Introduction to Equity, 1938.

The Breakdown of the Washington Treaties and the Present Sino-Japanese Conflict. The New Commonwealth Quarterly, Vol. IV, 1938.

Federalism and World Order. The New Commonwealth Quarterly, Vol. V, 1939.

The author would like to take this opportunity to acknowledge his grateful thanks to the Juridical Review for permission to reprint Professor Keeton's article on "National Sovereignty and the Growth of International Law" as Chapter II of this monograph.

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THE NEW COMMONWEALTH INSTITUTE

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NATIONAL SOVEREIGNTY AND INTERNATIONAL ORDER

CHAPTER I

The Failure of the League

There are crises in the history of human affairs when the knowledge that something is very seriously wrong obtrudes itself upon the consciousness of all thinking persons. Such a situation arose in Rome when it became generally appreciated that the frontiers could no longer be defended. So again at the close of the Middle Ages, the decay of feudalism, the invention of the printing press, the increasing effectiveness of gunpowder, the rise of the new monarchies and of nationalism in Western Europe, the beginnings of capitalism, and the increasing brutality of warfare compelled students and statesmen alike to think out anew the relationships of States. The result was an international order which survived in all essentials until 1918, and which will be described in the next chapter. The conclusion of the Great War saw the birth of another experiment in international regulation—the establishment of the League of Nations, the object of which was to unite all civilised States into a permanent association to outlaw war and to regulate by peacable methods the conduct of international affairs. Now, after an existence of less than a score of years, its coercive power has disappeared, its moral authority in the international sphere is non-existent, several great and a number of lesser nations have left it, and those still retaining officially membership are embarrassed by its continued existence. To abandon the League, as is now widely and openly advocated, is to admit finally that a great ideal is no longer attainable, while to

preserve it seems to invite continued ridicule of that ideal, making its ultimate achievement increasingly remote. Meanwhile on every hand, nations are piling up armaments on an unprecedented scale, and this increasingly severe competition threatens a general bankruptcy which can apparently only be averted by the desperate final throw of a general war. Such a war seemed about to break out in September, 1938, and was avoided only by the narrowest of margins, and at the cost of the partition of the last surviving democracy in Central Europe. Notwithstanding this great sacrifice re-armament continues with redoubled energy in Europe, although history has irrefutably demonstrated that armaments never purchase security. Instead, they increase the dangers of war. How has this situation, so pregnant with danger, and so utterly at variance with all the ideals professed by the victorious powers in 1918 been brought about? To explain it, one must pass rapidly in review the history of the League, mentioning the points at which its authority diminished.

It is no part of the purpose of this essay to add to the very full literature which exists upon the origin and working of the League. It will be assumed, therefore, that the reader has a general familiarity with League government and with the principal episodes in its brief and unhappy history. It remains merely to deduce conclusions from those episodes.

The idea of a federation of the peoples of the world is almost as old as civilisation itself.[1] Even the great conquerors of history may be said to have possessed it in some measure, and it may be that our modern dictators nourish dreams of universal dominion. In one respect, however, ancient conquerors were in advance of their modern counterparts. Having subdued an extensive empire, they then interfered little with the local life of the inhabitants, so long as obedience was rendered and taxes regularly paid.

[1] The reader is referred, in particular, to Chapter II of *The Problem of the Twentieth Century*, by Lord Davies.

The Empires of Alexander, of the Babylonians and of the Romans appear to have been rich in local cultures. Many races mingled, and even a number of different religions were tolerated. The modern dictators, scourged by the whips of an insatiable totalitarianism, are less liberal in outlook, and should their aspirations be realised, the world would assume a dreary uniformity from which the human species would speedily revolt.

Quite apart from the idea of universal conquest, however, philosophers and statesmen have put forward from time to time projects for a permanent association of States with the object of abolishing war.[1] One such project was the "Grand Design" of Sully, minister of Henri IV of France at the beginning of the seventeenth century. Another, which actually came into existence, was the Holy Alliance, which was established by the Tsar Alexander at the conclusion of the Napoleonic Wars. It has often been pointed out, however, strangely enough by protagonists of the League, that all these schemes suffered from a fatal inherent defect—they masked an ulterior political purpose, favourable to one or more of the contracting parties; a second criticism which has been lodged against them is that they were all leagues of sovereigns, and not of peoples. What was not perceived by critics until comparatively recently was that the League of Nations suffered from both these fundamental defects.

Though the project of the League was in many men's minds in the last two years of the war, primary responsibility for the shape which it subsequently assumed belonged to President Wilson. This great statesman saw in its realisation a new departure in international relations. For this to be possible, however, it would have been necessary to divorce the League completely from the war which had just been waged, for the peace settlement to

[1] A number of these, with their defects, are discussed by G. Schwarzenberger, *William Ladd: An Examination of an American Proposal for an International Equity Tribunal*, p. 22 *et seq.*

have been as reasonable as the wit of man could devise, and for the defeated nations to have been admitted at once to membership on the same footing as the victors. For these conditions to have been satisfied in 1918, it would probably have been necessary for the allied statesmen to be either supermen or angels. Instead, they were representatives of nations flushed with victory and rendered intolerant by prolonged suffering; even Wilson himself was not prepared to go to these lengths.[1] The result was that the League was incorporated into the Peace Treaties, and it was made a provision of the Covenant that members should guarantee each others' territorial integrity. The problem of peaceful change or revision was never adequately considered, while the ex-enemy States were excluded from the original membership. It is true that their eventual membership was contemplated, and that a permanent seat upon the Council was reserved for Germany;[2] but the ex-enemy Powers from the outset regarded the League as an organisation designed to perpetuate the settlement of 1919, which seemed to them to differ from the earlier general settlements only in the severity of its impact upon the defeated; it was shrewdly suspected that membership of the League for ex-enemy Powers would be delayed until they had trodden the length of the Way of Humiliation. It would seem from the history of the first ten years of peace that this suspicion was to some extent well founded. Though at the time the sufferings of post-war Germany were either ignored or minimised in the ex-allied press, history will probably attach much greater importance to them. In any event, they provided

[1] On the "duality of purpose" of the Peace Conference, see Schwarzenberger, *The League of Nations and World Order*, p. 46 *et seq.*

[2] Not, of course, in formal terms. Provision was made in Article 4, paragraph 1, of the Covenant for the members of the Council to be increased by "representatives of four other members of the League." "This had in view the eventual possibility of Germany or Russia being represented on the Executive Council." David Hunter Miller, *The Drafting of the Covenant*, Vol. I, pp. 285, 296.

the environment in which the Nazi movement was born.

The association of the League with the Peace Treaties seemed to offer security to France, for whom it guaranteed her 1918 frontiers and the continued existence of several central European allies, and to Great Britain, for whom it guaranteed immunity from future colonial and naval competition by Germany. The facts which President Wilson preferred to minimise were emphasised by the people he represented, and the United States declined to participate in the League. In that, their instinct has proved sounder than his. It is difficult to see what the League, as constituted, could have brought to the United States beyond participation in European entanglements during the first ten years after the war. To reproach the United States, as many European politicians and publicists have done, for failing to guarantee the *status quo* in Europe, seems to savour of hypocrisy. On the other hand, the abstention of the United States obviously weakened the authority of the League, and the failure of the United States to put forward any constructive proposals for a League in which it *could* participate, consistently with its own idealism, greatly weakened the forces making for international order, and at the same time encouraged the isolationist element within the United States. In the later history of the League that isolationist element has been given plenty of material from which to justify its attitude. Furthermore, the withdrawal of the United States, coupled with the exclusion of Soviet Russia[1] and the temporary exclusion of the ex-enemy countries, emphasised the ulterior political purpose of the League—a purpose which the ex-enemy countries, smarting under spoliation, could scarcely be expected to accept as a permanent foundation for international government.

The second defect of the League, present from its incep-

[1] On this, see Schwarzenberger, *The League of Nations and World Order,* pp. 38-40.

tion, is still to-day less generally appreciated than that just discussed, yet it is equally fundamental and has given a touch of unreality to the whole of the proceedings of the League. It was sometimes asserted, rather hesitantly perhaps, by protagonists of the League in the early days of its existence, that it differed from all earlier Leagues in being an association, not of governments, but of free peoples. There are, unfortunately, in the political sphere, degrees of freedom, and the degree enjoyed by the peoples of, say, Albania and Abyssinia has never been extensive, nor could that of Poland be compared with that of either France or Great Britain. Even putting these specific examples on one side, however, since there was no machinery whereby the people could appoint their representatives directly to the League, and since, in consequence, the governments of the member States appointed the representatives, continued representation of peoples, even at second or third hand, obviously depended upon the establishment and maintenance of democratic institutions in the component States of the League. In 1919, the survival or establishment of such democratic institutions in the component States was assumed. To-day, however, democracy is merely one of several forms of government, and at the moment, it seems to be fighting a rearguard action. At present, we will not pursue the implications of this in international relations. We will rest content with the conclusion, that even if the Powers who have seceded from the League were to return, it would not be a League of peoples, but an association of governments. To this may be attributed the lack of vitality which has characterised the League in its brief history. Those who have moulded the League's destiny have served first their governments, from whom they have derived their authority. Where such service has also coincided with League duties, the cause of the League has advanced, but no further. For proof one only needs to refer to the progress of the League's activities in relation to the chief disputes which

have come before it,[1] and one is tempted, in despair, to add that the League would have possessed more integrity, and more chance of ultimate survival, if the national representatives had been elected by the members of the League of Nations Union in the respective States. There might then have been some continuity of purpose, and more development of a collective outlook; though of course, had such a remote possibility ever been put into practice, the League would have been compelled for many years to proceed warily before it could have become more than a powerful moral force in the world. However, it might then have been possible to contemplate the possibility of developing a genuine loyalty to the League in place of the lip-service which has played no small part in its downfall. The Roman Catholic Church furnishes an example of a body which is in a sense a league of peoples, even though its supreme government is only remotely democratic, for below its hierarchy there is an association of free wills whose pursuit of an ideal transcends national frontiers.[2]

The League may be said to have been established for three main purposes: (1) The settlement of disputes which, if left to the contesting parties, would lead to war; (2) collective security; and (3) in consequence of the achievement of the first two purposes, the promotion of disarmament.[3] It will be shown presently that these objects are defective. There was no adequate provision of machinery for peaceful change, and the questions of the promotion of international intercourse by the removal of trade barriers, of the investigation of the problem of currencies and of the supply of raw materials do not seem to have received extended consideration from the original founders of the

[1] See further, Chapter V.

[2] The stubborn resistance of the German Churches to totalitarianism stands in sharp contrast with the lukewarm attitude shown everywhere among the peoples of League members towards sanctions. They regarded it as an issue with which they were only remotely associated.

[3] See further Schwarzenberger, *The League of Nations and World Order*, pp. 130-134.

League.[1] From time to time, however, the League has been compelled to take partial cognisance of these matters. Even judged upon its avowed main objects, it has failed lamentably; and the reasons for that failure are not difficult to discover.

Let us examine first the question of the settlement of disputes. There is general agreement among writers that the League handled several disputes between smaller powers firmly and with credit. Several of those early disputes, and the methods by which they were settled, are excellently described by Mr. Conwell Evans in his monograph *The League Council in Action*. Thus there was, for example, the dispute in 1920 between Sweden and Finland over the Aaland Islands, the narrowly-averted war between Yugoslavia and Albania in 1921, and the Mosul dispute between Great Britain and Turkey. It is necessary to recognise, however, that a dispute such as that between Sweden and Finland would not in any event have led to war, while the others, occurring so soon after the Great War, would not have been permitted to lead to a general war, even without a League. Let us admit, as Mr. Conwell Evans strenuously maintains, that the existence of the League machinery proved most valuable in providing for the separation of the combatants. Is there any reason to suppose that identic telegrams from Great Britain, France and Italy would in those days have proved less effective? The truth of the matter is that the League has been given credit in the books for a number of settlements which could have been made as effectively, and as speedily, under pre-war diplomacy. It was not for the settlement of disputes of this kind that the League came into existence, but to avert the threat of war in serious disputes between major Powers.

In those early days, however, there were disputes involv-

[1] Though President Wilson was not unaware of the importance of removing trade barriers, in view of Point 3 of the Fourteen Points and Article 23 (*c*) of the Covenant.

ing greater League Powers which were settled less creditably. In October, 1920, Polish troops seized Vilna, which had been allotted by the Allies to Lithuania. When Lithuania appealed to the League, the League drew a provisional line of demarcation, excluding Vilna from Polish occupation and ordering Poland to withdraw. She ignored both this order and the activities of League representatives in the disputed area. Poland was then at war with Russia, and when shortly afterwards her campaign was crowned with victory, thus at last securing her eastern frontier, all pretence of seeking to oust her from Vilna was dropped. A small Power had been thrown to the lions, and a precedent had been set. In 1923 the Conference of Ambassadors coolly overrode the League, awarding Vilna to Poland.

Mr. Conwell Evans, in describing the unsatisfactory handling of this episode by the League is inclined to explain it on the ground that the League was in its infancy, and that the Supreme Allied Council was then regarded as the dominating agent. Admitting the first point, the second is in itself noteworthy. Poland, at war with the Soviet, had nevertheless been able to defy Great Britain and France, at that time in unquestioned control of Western Europe, and successfully despoil Lithuania. The reason is not far to seek. France had no desire to hamper the activities of her ally, engaged in a life-and-death struggle with Russia, and the mishandling of the Vilna dispute, as Mr. Conwell Evans points out, can be traced directly to this cause. That in itself was a sinister fact. There was in reality no League policy throughout the incident. The Powers concerned simply used the League machinery to further their own policies. Since, in this case, the policy of one of the dominating Powers did not coincide with the interests of the League, the League suffered, and it has been doing so ever since.

It may be said that Poland in 1920 gave the League its first lesson in realism. Three years later, one of the

ablest of modern political realists, Signor Mussolini, was able to follow the Polish precedent, and to drive home the lesson that the League can give no security to small Powers, where an interest of a major Power is directly threatened. Once again the succession of events plainly point the moral. For some time after the end of the War, Albania's boundaries remained undefined. Eventually the Ambassadors' Conference appointed a Commission for the purpose of settling them, and at the end of August, 1923, the Italian members of the Commission were ambushed on Greek territory and killed. Amongst them was General Tellini. The Italian Government held the Greek Government responsible, and presented a number of demands, to which a reply within twenty-four hours was required. The note was dictatorial in form, the fifth paragraph requiring Greece to pay Italy 50,000,000 lire as compensation within five days. Greece replied within the time specified, accepting four out of the seven demands, but rejected three, including the demand for an indemnity, as violating the sovereignty of Greece. The Greek Government also added that if Italy was unwilling to accept their point of view, they were prepared to appeal to the League and to abide by its decisions. This reply was considered inadequate by Italy, which, ignoring the invitation to refer the matter to the League, on August 31st bombarded Corfu, following which the island was occupied. Meanwhile Greece had appealed to the League without mentioning the bombardment.

The subsequent history of the dispute shows the unsatisfactory shifts and expedients to which the League was already compelled to resort in such cases. No attempt was made to induce or compel Italy to evacuate Corfu before the issue in dispute was discussed. This was due to the fact that Signor Mussolini had plainly indicated that if the issue was left to the Ambassadors' Conference, he would evacuate Corfu as soon as the indemnity was paid, whereas if the League interfered he would stay

there indefinitely. These were strange statements from the head of a member State, but Mussolini had already decided that the League was only a metaphysical concept and history has proved his diagnosis correct. In spite of a bold speech by Viscount Cecil, the League Council tamely acquiesced in the situation, contenting itself with a discussion of the measure of Greek liability. Meantime the Ambassadors' Conference was also considering the question; they first accepted, then modified the decision of the League Council in circumstances which have given rise to the suspicion that the Ambassadors' Conference had struck a bargain with Mussolini for the evacuation of Corfu in return for the full amount of the indemnity.[1] As a result, a powerful member had openly flouted the League, a dispute between two members had been settled outside the League, and the League had (*a*) failed to restore, or to attempt to restore, the *status quo* (this was at least attempted in the Vilna dispute), and (*b*) had failed even to condemn the obviously unlawful conduct of Italy. For all practical purposes Italy ceased to operate in accordance with League principles after 1923, and her withdrawal in 1937 might well have been antedated by fourteen years. It would have at any rate saved the League two further humiliations.

Once again the observer wonders why no League settlement was possible in this case. The excuse commonly given, both by the press and by League statesmen, was that the Conference of Ambassadors in fact settled the matter more quickly and smoothly than the League could have done. Such reasoning suggests that already in 1923 the practical ineffectiveness of the League was recognised, and that the older methods of diplomacy were preferable—and as yet the League was only four years old! The inference seems inescapable that from the beginning the major Powers regarded the League merely as an instrument of national policy. If one examines the ulterior motives of

[1] See Conwell Evans, *op. cit.*, pp. 79-80.

the settlement, one finds a covert sympathy between the Government of Great Britain and Italy, allegedly recently rescued by Fascism from Communism, and a coolness between Great Britain and France, due to the latter's recent occupation of the Ruhr. Even France on this occasion was lukewarm in support of the League, for her own occupation of the Ruhr had been regarded by Great Britain as illegal, and awkward comparisons between that exploit and the Corfu incident could be, and in fact, were made.

So far the violators of League principles had been ex-Allied Powers operating in Europe within a fairly narrow compass. The extent to which the desire for the preservation of international order had waned was revealed to the world in 1931, when Japan seized Manchuria. The conclusion of peace had brought many disappointments for Japan. German rights in Shantung had been surrendered, but the Washington Conference prevented Japan from obtaining them. Meanwhile, the growth of Soviet influence in China provoked intense anxiety, more especially in view of the steadily increasing anti-Japanese attitude of Chinese nationalism. This was a problem of major importance for Japan, who obtained large supplies of raw materials and foodstuffs from China, and who aspired to the eventual domination of the Chinese market. It was a problem which a strong League might have approached prior to 1931 in a generous and constructive spirit. Nothing was done, however, and in 1931, profiting from the acute economic distress of Great Britain and the United States, Japan made a forward move in Manchuria. Baldly stated, from the standpoint of the League the Manchurian question may be summarised as follows: In September, 1931, hostilities between Chinese and Japanese troops broke out at Mukden, and within a short time Japan had overrun Manchuria. The Chinese Government took all possible steps to suppress provocative acts in China proper, and Chinese public opinion placed considerable faith in the

strength of their case which was presented to the League under Article 11 of the Covenant, according to which it is the "friendly right" of any member to bring to the notice of the League any circumstance threatening international peace. The Council held several sessions (without public debate) and eventually it was decided to send the Lytton Commission, in which the United States had agreed to participate, to investigate the question on the spot. Before the Commission arrived, however, Japan had set up the puppet State of Manchukuo, thereby making her retreat impossible. Later, China appealed again to the League under Article 15 of the Covenant, which provides for League jurisdiction over disputes between members likely to lead to a rupture (no declaration of war having been issued by either side). In accordance with the Article, the Council referred the dispute to the Assembly which accepted the policy of the United States not to recognise any situation, treaty or agreement brought about contrary to the Covenant or the Kellogg Pact, both of which Japan had plainly violated. When the Lytton Commission reported, its findings were promptly denounced by Japan, who recognised Manchukuo and announced her intention of withdrawing from the League. Meanwhile the Lytton Report was submitted to the Council. It was divided into two parts, the first part being an analysis of past events and the second comprising recommendations for the settlement of the dispute. Since it was obvious that the League was now powerless, there ensued a long wrangle over the first part of the report, at which both the Chinese and the Japanese representatives were present, engaging in acrimonious dispute. Finally, in February, 1933, the issue having been adjourned into the Assembly, that body drew up a report which in fact constituted a censure of Japan, and then set up a Committee to examine the proposals contained in Chapters IX and X of the Report of the Lytton Commission. That Committee never even assembled, and the League made no further attempt to

settle the dispute, so that the subsequent encroachments of Japan in Jehol and North China failed to evoke even a formal protest from the members of the League.

In an article in the *New Commonwealth Quarterly*,[1] Lord Lytton has pointed out the folly of this irresolution. Had the facts of the Report been accepted, the League would have been spared the long dispute between the contestants, and since the Report carefully abstained from condemning Japan, it might still have been possible to secure Japan's co-operation in a settlement. However slender the possibility, it should have been tried. Finally, Lord Lytton points out:

> " The long delay in coming to agreement about the facts, first in the Council and subsequently in the Assembly, naturally led the Japanese to believe that a face-saving formula would eventually be adopted; if that was not intended, why the delay, because there never was any question of the League not accepting the findings of its Commission? The final result, therefore, was not only disappointing to Japan, but the form of the resolution was wounding to her national pride. In the circumstances she had no option but to resign from the League, and in doing so she had many sympathisers in other countries. Finally the fact that her resignation was accepted after the expiration of two years was equivalent to an exoneration by the Assembly of the facts on account of which it had condemned her two years previously, since Article I of the Covenant provides that a State member may only withdraw from the League after two years' notice of its intention so to do, 'provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.' Nothing, of course, can compel a nation to remain a member of the League of Nations against its will, but it can be pre-

[1] "*The Lessons of the League of Nations Commission of Enquiry in Manchuria*," *New Commonwealth Quarterly*, December, 1938.

> vented from resigning if the conditions laid down in the Covenant have not been fulfilled. If, in the opinion of other members, a State has not fulfilled 'all its international obligations and all its obligations under the Covenant' it can be 'declared to be no longer a member of the League' under Article XIV (4). For the Assembly to pass a resolution in 1933 in effect declaring Japan had violated her obligations under the Covenant and then accept her resignation in 1935 was to stultify the League and to show the world that it could be successfully defied."

Lord Lytton hardly goes far enough. Already in 1920 and in 1923 Poland and Italy had shown that the League could be successfully defied. The Manchurian episode proved that the League could no longer guarantee the territorial integrity of its members—a factor quickly appreciated by Italy. As for expulsion, that has never seriously been considered.[1] On the contrary the League has become a club for which the subscription is nominal and the personal reputation of the applicant nil.

Concerning the conquest of Abyssinia by Italy there is no scope for discussion. Marshal Badoglio has told us with artless candour that Mussolini intended to annex it as early as 1931. Possibly the Japanese incursion into Manchuria was already pregnant with significance for the Fascist Grand Council. Preparations for the campaign were undertaken in the full blaze of publicity and the significance or insignificance of the Walwal incident may therefore be ignored. Italy had admitted that she wantonly provoked war with a fellow member of the League, with the intention of annexation, and all efforts at mediation were therefore brushed aside. When hostilities broke out Abyssinia, as a matter of course, appealed to the League, and Sir Samuel Hoare in an impressive speech at Geneva gave an authoritative enunciation of League principles. It seemed probable that at last the nadir of the League's

[1] Except in the case of Liberia.

fortunes had been reached. This time the violation of League principles had surely been too direct. Disillusionment came swiftly, however. The notorious Hoare-Laval proposals of December, 1935, startled the public opinion of the world by proposing a dismemberment of a member of the League. For once, public opinion in both Great Britain and France expressed itself unequivocally in opposition to this masterpiece of cynicism. Both Hoare and Laval were driven from office, but the complicity of the English Cabinet as a whole could be deduced from Mr. Baldwin's speech of apology to Parliament and from the subsequent return to office of Sir Samuel Hoare. In this way, Mr. Baldwin's Cabinet doubly flouted public opinion.

At the moment, however, the English people had not only condemned Sir Samuel Hoare; it had also unmistakably expressed its desire to see Mr. Eden, who was generally regarded as possessing a genuine desire for effective League action, appointed as his successor, and that wish at least was gratified.[1] Already in November, 1935, sanctions had been imposed by the League in respect of a number of commodities. A detached observer would perhaps notice, however, that since Italy's army of invasion had now for the most part passed through the Suez Canal, there was necessarily a cessation of the abnormal dues which had been extracted by the shareholders during the period of preparation. He might also notice that the Italian invasion was proceeding very much more quickly than the European experts had believed possible, and the threat to Egypt and the route to India of an Abyssinia entirely under Italian domination was unmistakable. Already an important concentration of British warships in the Mediterranean had occurred, and the Italian attitude had become so menacing that they had been removed from Malta to Alexandria. Previously, Mr. Baldwin had committed himself to the proposition that "sanctions mean war"—a deduction justifiable by the course which events

[1] He was appointed Foreign Secretary on December 22nd, 1935.

were taking. Accordingly, the scope of the embargo on exports to Italy was limited to exclude oil. Lack of this commodity must necessarily have crippled the Italian invasion of Abyssinia; interruption of communication through the Suez Canal would have been its deathblow. Even if, in desperation, Italy had declared war, her plight would have been hopeless, for Great Britain had secured guarantees from the Mediterranean League Powers that their harbours would be available for the British fleet. Why, in the circumstances, the Mediterranean was not sealed at both ends, and the aggressor left to her fate had never been explained. This was probably the last moment when collective security would have been realised. Why was it deliberately thrown away by Great Britain when the League's policy coincided with her national interests, and when France had at last been reluctantly dragged in the wake of her stumbling ally?

Whatever the reason (and only conjecture is possible) the independence of Abyssinia was extinguished and the worst fears of the smaller States were realised. Membership of the League was transformed from a coveted right into a liability. It exposed them to the wrath of powerful international bandits, and offered no corresponding advantages. Rearmament became general, defensive alliances were hastily renewed, and new ones were concluded. Great Britain forfeited alike respect and the privilege of leadership. Henceforth the pace in international affairs was set by other Powers, upon whom the smaller States began to cast a fearful eye. The League was moribund.

The later episodes in international affairs do not call for extended comment, for the pretence of League jurisdiction has been abandoned. A civil war was fought in Spain for nearly three years, but the League took no cogniscance of it. It is true that civil wars are not strictly the concern of the League, yet the open and avowed intervention of other States in that civil war is obviously

within the scope of Article XI (2). It is also a violation of Article X, but no one thought fit to advocate any League action in the matter. In so far as any steps were taken, they were within the province of the Non-Intervention Committee, of Powers operating outside the machinery of the League. Again, when in 1937, Japan resumed her interrupted conquest of China proper, the League contented itself with passing a resolution condemning the aggressor, and then shelved its responsibility.[1] Even the absorption of Austria by Germany has failed to evoke a declaration of policy from the League,[2] while the Anglo-Italian Pact of 1938 ratified Italy's illegal conquest of Abyssinia, and went a long way towards justifying the Italian dictator's contempt of the League.[3]

It is submitted that such a swift deterioration in legal and moral principles in the conduct of international affairs is difficult to parallel from any period of the world's history. In the sphere of disarmament, the record of the members of the League is equally unsatisfactory. When the League was first established, one of the six Committees of the Assembly was directed to investigate the question of disarmament, and in 1921, the Secretary-General, in accordance with a resolution of the Assembly, asked all Governments of members whether they were prepared to limit their military, naval and air expenditure for the two following years to that allocated for the next financial

[1] During the height of the Czechoslovakian crisis, the Assembly pronounced Japan an aggressor, and agreed that members were free to impose what sanctions they thought fit against her; but this action has been destitute of any effect upon the course of the war.

[2] It should be noticed that Germany, even after her withdrawal from the League, is still bound, as a signatory of the Peace Treaties, to regard as legitimate any action within the compass of Articles X-XVII. These obligations have been recognised by Nazi jurists. See Schwarzenberger, *The League of Nations and World Order*, p. 106.

[3] When the Anglo-Italian Pact was brought into operation in November, 1938, the British Ambassador was accredited to the King of Italy as Emperor of Ethiopia, and the British public were invited by the National Government to regard the Abyssinian dispute as another "untoward incident" to be forgotten as soon as possible.

year. The replies to this exceedingly modest proposal were significant. Less than two years after the establishment of the League, and within three years of the conclusion of the war of 1914-1918, of twenty-seven replies received, only fifteen were in agreement with the proposal, five were inconclusive, and seven were actually hostile. This may be regarded as one of the turning points in the history of the League, for if the League were to be regarded as an effective force, armaments should necessarily have become either a luxury, or else elements in the establishment of an international police force. Already, therefore, a considerable number of members were thinking in terms of the old pre-war power politics. Moreover, it is significant that these replies to what should have been a fundamental question of League policy passed almost unnoticed in the world's press, which was quick to penetrate the attitude of members to the League's sphere of activity. Nevertheless the Disarmament Committee continued its labours among ever-increasing difficulties. The Vilna and Corfu incidents, as has already been pointed out, were blows at the security of the smaller States, and already in the session of the Assembly in September, 1921, Canada proposed the abolition of Article 10 of the Covenant, by which the members undertook to preserve the territorial integrity and independence of members against external aggression, and Dr. Benesh, for Czechoslovakia, proposed that "Leagues within the League" should be permitted, if approved by the Assembly. The League took no action in either case, but the trend of national thought which these proposals indicate is significant.

At the third Assembly, 1922, there was a lengthy debate in the Assembly upon armaments, terminating in the adoption of a report asserting the interdependence of schemes for disarmament and guarantees for security, and suggesting a Temporary Mixed Commission (*i.e.*, including experts) to prepare a draft treaty aimed at securing these. Thus, the League had embarked upon its long and barren

investigation of the implications of security, of which the first tangible product was the Mutual Guarantee Treaty approved by the Assembly in September, 1923, that is immediately after the Corfu incident. This treaty was regarded by many of the Governments to which it was submitted as inadequate, with the result that the more comprehensive Protocol for the Pacific Settlement of International Disputes, based on Security, Arbitration and Disarmament was drafted. Cumulatively, the provisions of the Protocol represent the highest formal enunciation of the principle of international solidarity yet attempted; had they been adopted and honestly carried out, they would have formed a powerful reinforcement to the Covenant. It will be remembered that in the drafting of this Protocol, the British Government, under the leadership of Mr. Ramsay Macdonald, played a prominent part. When, however, the Protocol was submitted to the various Governments for ratification, Mr. Macdonald's Government had been replaced by Mr. Baldwin's, and a more insular view prevailed, with the result that the British Government rejected the Protocol and the project was killed. At the time the scheme embodied in the Protocol was ridiculed by influential statesmen in this country as visionary, but subsequent events have shown how absolutely necessary it was, and how quickly a hand-to-mouth policy in international affairs reacts upon the interests of countries.[1]

The later history of projects for disarmament need not be traced. They produced a vast technical and semi-technical literature which is now of merely antiquarian interest, and since after 1924 it was plain that no State was prepared to make a genuine effort on behalf of the principle of collective security unless an important interest of its own was threatened by a law-breaker, discussions tended to follow a uniform pattern. Each State was

[1] The chief defect of the Geneva Protocol, as Dr. Schwarzenberger has pointed out, was that it provided no adequate means for effecting treaty revision or for territorial modification of the *status quo* (*William Ladd, op. cit.*, p. 52).

prepared to advocate such a form of disarmament as limited the potentialities of other States, which might be regarded by it as possible opponents at some future time. How academic the whole question had become may be illustrated by the proposition maintained by learned French writers that even total disarmament was no solution, because the war-potentiality of States, both in man-power and resources remained unequal. These propositions cannot be condemned, for they had (and have) real point in a world in which no State can rely either upon the Law, or upon those who have undertaken to uphold the Law, in a time of emergency. The whole question of disarmament hinges, and has always hinged, upon the question of security, and once collective guarantees of security have proved ineffective there can be no further discussion of disarmament.

It must not be overlooked that since the War the world has witnessed one notable example of partial disarmament. In 1922, the Powers with interests in the Pacific assembled at Washington to settle questions left outstanding by the War and the Peace Treaties. Agreement was speedily achieved upon these questions, with the result that an agreement upon naval disarmament was reached without the lengthy preparations which had preceded any tangible proposals submitted to the League. The reasons for this satisfactory settlement, reached outside the framework of the League, are not far to seek. The conclusion of the War had seen the destruction of the German fleet, and with it, the only real threat to England's naval supremacy in Europe. A contest between this country and the United States having become accepted as impossible upon both sides of the Atlantic, it was obvious that in the situation as it existed in 1922, there was, as between the two countries, no need for a race in naval armaments. Since both Powers had extensive commitments in the Far East, however, it followed that neither could remain indifferent to Japanese naval activities. When the outstanding ques-

tions in the Far East were cleared up, there was thus no longer any need for competitive building between any of the three Powers, with the result that all three were in substantial agreement that there should be some limitation of capital ships, and the details could therefore be left to the experts to work out.[1] When the political conditions in which the expert works are non-aggressive, the problem is patently simple. Equally, when those conditions include "hypothetical" hostile situations, with no certainty of the strength of a possible enemy, or of the numbers of his allies, or of the identity and strength of the allies of the expert's own country, the problem is insoluble. This is the plain moral of the post-war history of the disarmament question.

One final point remains to be considered. The ex-enemy nations watched the progress of efforts towards disarmament with intense interest, for by the Peace Treaties their own armaments had been drastically reduced. Thus Germany was restricted to a professional army of a hundred thousand men, and the left bank with part of the right bank of the Rhine was demilitarised.[2] Though this was the result of Germany's military defeat in the war, it was also intended to be the first stage in the general disarmament, rendered the easier because of the abolition of the armed forces of the world's greatest military power. This objective was therefore embodied in Article VIII of the Covenant.[3]

The intention of the article was clear. Armaments were

[1] See further, *The Breakdown of the Washington Treaties and the Present Sino-Japanese Conflict*, by the present writer, *The New Commonwealth Quarterly*, June, 1938.

[2] Treaty of Versailles, Article 42.

[3] Article VIII runs:

"The Members of the League recognise that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety, and the enforcement by common action of international obligations.

"The Council, taking account of the geographical situation and circumstances of each State, shall formulate plans for such reduction for the consideration and action of the several Governments.

"Such plans shall be subject to reconsideration and revision at least every ten years.

"After these plans shall have been adopted by the several Govern-

to be stabilised and progressively reduced, and the arms traffic was to be internationally regulated. As the security envisaged in the League system strengthened, reliance upon armaments for anything more than police purposes would diminish. It has already been pointed out that as early as 1921, within two years of the establishment of the League, no less than twelve members, out of twenty-seven addressed, were unable to promise to limit their armaments for the following two years to the scale of that of the next financial year. It does not seem any exaggeration, therefore, to say that the implications of the Article were never accepted by the entirety of the members of the League. The results were disastrous. It is by no means beyond the bounds of possibility that a serious attempt to implement this Article would have convinced the United States of the honesty of intent of the members of the League. When, however, the members declined substantially to reduce their expenditure on armaments at the very time that they were repudiating their indebtedness to Great Britain and the United States for the materials wherewith they had waged the last war, it is not surprising that the attitude of the United States became one of profound distrust. Moreover, had a genuine reduction in armaments been achieved, the open violations of obligations to the League by powerful members, such as the violations committed by Italy in respect of Greece and Abyssinia, would not have taken place, for the means to execute them in defiance of the League would have been lacking. Worst

ments, the limits of armaments therein fixed shall not be exceeded without the concurrence of the Council.

"The Members of the League agree that the manufacture by private enterprise of munitions and implements of war is open to grave objection. The Council shall advise how the evil effects attendant upon such manufacture can be prevented, due regard being had to the necessities of those Members of the League which are not able to manufacture the munitions and implements of war necessary for their safety.

"The Members of the League undertake to interchange full and frank information as to the scale of their armaments, their military, naval and air programmes and the condition of such of their industries as are adaptable for warlike purposes."

of all, the breakdown of successive projects for disarmament finally convinced Germany that the League was merely a façade, behind which the national policies of fully armed members were being prosecuted with unabated vigour. It therefore became imperative for her to rid herself at the earliest possible moment of the restrictions imposed by the Treaty of Versailles. The result was the announcement of German rearmament in 1935, and the re-occupation of the Rhineland in 1936. If public opinion in this country and elsewhere acquiesced in those acts without overmuch protest, it was because public opinion realised how grossly the disarmament question had been mismanaged.

It must be stated that the policy of Great Britain remained attached to the principle of disarmament as long as there remained the remotest justification. Mr. Baldwin declared that he himself was convinced of the necessity for rearmament twelve months before his Government seriously undertook the task. Because of the sincere attachment of the public opinion of this country to the policy of disarmament, however, rearmament was delayed until Italy's increasingly hostile attitude and Germany's repudiation of a policy of change by negotiation revealed its necessity. Now the entire world is faced with an era of competitative rearmament which can only lead to national bankruptcy—or war. Preparations to preserve individual security are now costing Great Britain over £1,000,000,000 a year, and the end of this orgy of spending is not yet in sight. Indeed, the longer this competition in armaments continues, the more reckless does it become. That is the price to be paid by nations for their pursuit of an individual security that will protect selfish national aims; and moreover, it is generally recognised that this security is in fact a misnomer. Is it not time that the international community began to consider, from the widest possible viewpoint, the price it is prepared to pay for an enduring peace?

CHAPTER II

National Sovereignty and the Growth of International Law

The League which was established in 1919 was a League of *Nations*, and a jurist or international lawyer of the realist school, had he appealed to logic, and not to the emotions, would have been compelled to admit at the time of its birth that failure was implicit in its title, for it emphasised all that nations were *not* prepared to relinquish. The word "federation" would have implied that a permanent association was designed, in which the nations were relinquishing, to some degree, their liberty of action; the use of the word "nations," emphasised differences that were too fundamental to be surmounted by the League as it was actually framed. Turning back to the literature which the birth of the new project evoked, it is interesting to see how the fundamental weakness was stressed even by many of its protagonists. Thus the late Sir Geoffrey Butler, in his *Handbook of the League of Nations*,[1] said:

> "In designing a League with a continuous life, and yet a life dependent always upon the continued assent of the participating nations, the Paris scheme avoids two dangerous extremes. It neither aims at erecting a super-State, reducing the nations of the world to vassal dependencies or component provinces; nor does it rest content with the alternative open to the world during the epoch of the Hague Conferences and the Hague Tribunal, the erection of an impartial international body to which voluntarily, and in consequence fitfully, the disputants among the nations might resort."

[1] 2nd Ed., p. 29.

This is identical in import with the British White Paper, in which the foundation of the League was described. The Covenant was, it said, "a solemn agreement between sovereign (and independent) States, which consent to limit their complete freedom of action on certain points for the greater good of themselves and the world at large."

This is probably the finest example in history of an attempt by the great nations to have their cake and eat it.

It is quite clearly the case that in 1919 the Covenant of the League was the utmost that was attainable. Indeed, looking back, it is surprising that even so much was actually attained. Moreover, had the Covenant been honestly fulfilled by members, the world to-day would have been a very different place. It is probably because the governments of member States, on reflection, concluded that too much had been promised by them in the Covenant that they deliberately deprived the League of the possibility of organic growth. Still, it is a little surprising to find propagandists on behalf of the League setting their approval on the very elements in the arrangement from which failure would necessarily emerge. It would have been wiser frankly to have admitted that this was the utmost concession which could be wrung from reluctant Governments, and that the extent to which the League became a success or a failure depended upon the extent to which the consciousness of the existence of an international community succeeded in checking irresponsible action by the governments of member States. General Smuts had a far truer vision of the needs of the situation, when he wrote in 1918, before the Peace Conference assembled:

"It is not sufficient for the League to be a sort of *deus ex machina*, called in very grave emergencies when the spectre of war appears; if it is to last it must be more. It must become part and parcel of the common international life of States, it must be an ever-visible, living, working organ of the polity of civilisation. It must function so strongly in the ordinary peaceful intercourse of States

that it becomes irresistible in their disputes; its peace activity must be the foundation and guarantee of its war power."

Sir Geoffrey Butler, in citing these words,[1] evidently thought that they meant the same thing as the White Paper of the British Government. In fact, they imply a good deal more. They visualise an organ of government of an *international polity,* with a vitality of its own. This is what the League has never been, and the difference between what General Smuts intended it to be and what the British White Paper imagined it to be is the measure of its failure. The League has foundered upon the rock of national irresponsibility, or, to give it its juridical disguise, of national sovereignty.

The fetish of national sovereignty assumes the shape of the evil genius in the modern European forest of international intercourse. The mediaeval world knew nothing of it. In theory there existed Christendom, with its twin heads of Pope and Emperor—a unifying theory, exercising considerable influence upon political and philosophical speculation until the close of the Middle Ages. In the world of reality there was feudalism, with its implications of contractual relationship between overlord and tenant. Both were governed by the law, and that law could only be changed by the consent of both. In any event, the authority of the lay courts was limited by the existence of ecclesiastical, mercantile and other jurisdictions. Moreover, the sentiment of nationality was not yet born. The Angevin Empire, for example, extended over both sides of the Channel. France, Germany, Italy and Spain were merely geographical discriptions, covering a miscellaneous assortment of petty lordships, established by the centrifugal element in feudalism.

In the sixteenth century, however, fundamental changes took place. Gunpowder rendered the old feudal levies obsolete, and permitted vigorous kings to raise powerful

[1] *Op. cit.*, p. 28.

armies independently of the approval of the baronage. In the economic sphere too, feudalism had broken down, and the discovery of the New World dealt it its death-blow; while in the sphere of religion the Reformers split Christendom and destroyed the last unifying element among the peoples of Western Europe. Within the space of half a century, powerful nation states were established in England, France and Spain, able to compete on terms of equality with the Imperial power, while Sweden and at a slightly later date, Russia, appeared upon the political scene as considerable European powers. For the first time since the fall of the Roman Empire, absolute and uncontrolled authority existed in Western Europe. Rulers arrogated to themselves as a matter of course the right to prescribe the religious beliefs of their subjects; Protestantism brought no more liberal outlook than Catholicism upon this point. Meanwhile since warfare had lost the constraints which feudalism had imposed in the interests of the nobles, it became increasingly ruthless, culminating eventually in the long-drawn out horror of the Thirty Years' War.[1]

As in these days, so at that time there were political and legal philosophers prepared to explain and justify what was taking place. Machiavelli, generalising from the conditions which existed in the Italy of his day, delivered a frontal attack upon the theory that any tangible restraints could be imposed upon the conduct of a ruler in his dealings, either with his subjects or with foreign States. His philosophy is based on realism. There are no *legal* restraints upon the ruler's power, and whatever moral restraints there are, are of his own making, and are based purely upon expediency. A wise ruler will normally keep faith both with his own subjects and with foreign princes, because it is desirable to acquire a reputation for trustworthiness, in which he will be able to prosecute his aims without undue hindrance. In times of grave emergency,

[1] In considering the brutality of the wars of the 16th and 17th centuries, the ideological character of those wars should not be overlooked.

however, he will not hesitate to break his word because the ultimate object—the advancement of his own power—justifies such a course. There are implicit in this philosophy two doctrines which have greatly retarded the growth of a true international community—the doctrine that "necessity knows no law," which has survived in the international sphere, although the rapid advance of democracy rendered it until recently of little importance in the domestic affairs of a State; and the theory of State-absolutism, which has proved the greatest obstacle of all to the development of international order.

Although Machiavelli may have expressed his point of view more logically, he was basically at one with the prevailing school of Renaissance political thought. Even Luther added something to this philosophy, since his championship of a reformed faith did not take him beyond the doctrine of *cujus regio ejus religio,* which received international recognition in the Peace of Augsburg, which ended the first phase of the religious wars in Germany and led to the acceptance of the subordination of the Church to political power. Even in countries which repudiated Lutheranism, *e.g.,* Spain, and England during the reign of Henry VIII, this doctrine was seized upon to subordinate Church to State, and thereby to exalt the power of the ruler. Eventually, towards the end of the sixteenth century, a French political theorist, Jean Bodin, in *Les Six Livres de la République,* formally enunciated the modern doctrine of sovereignty. Defining it as the supreme authority within the State, whence all laws proceed, he declares that in its formulation of laws it is subject to no human restraints. The mediaeval theory of a Law of Nature in Bodin's scheme has been reduced to a factor which may influence a ruler's conscience. A law which conflicts with it must nevertheless be obeyed for it derives its validity from the absolute authority, or sovereignty, of the ruler, which no other authority can challenge.

The general acceptance of this theory in Western Europe

brought with it important changes in the organisation of States. Prior to the Renaissance, as has already been pointed out, there was no uniformity of jurisdiction over the inhabitants of a particular territorial area. A man might be subject to feudal, to ecclesiastical, to mercantile or to several laws. This was a survival of the old personal conception of jurisdiction which was such a striking feature of the period which followed the break-up of the Roman Empire in Europe, and consequently, it will be found that where a number of foreigners resided within the dominions of an alien ruler (often for purposes of trade), exemption from local jurisdiction, either complete or (as was more frequently the case) for civil disputes only, was freely conceded.[1] The extension of the authority of the State (or its ruler) over its territory, however, brought with it not only the decay of the feudal and the ecclesiastical courts, but also the subordination of resident foreigners to the local law. By the eighteenth century it was becoming exceptional to concede immunity from local jurisdiction to foreigners by treaty, although in areas where Western conceptions of sovereignty had not penetrated, foreign traders made good their claims to immunity and the system of extra-territoriality which was established lasted until our own day. It is interesting to notice in connection with these arrangements that they were only seriously resented when the Western theory of sovereignty had made headway in the Eastern countries in which the system existed. Prior to this, neither Turkey nor China had regarded the immunity of foreigners from local jurisdiction as a serious impairment of its status. Indeed, in the case of Turkey, the initiative for the system seems to have from the local ruler, and not from the foreigner, since Turkish law was regarded as inapplicable to unbelievers.

In the majority of the writers of the sixteenth century, it was assumed that this plenitude of political power which

[1] A number of illustrations of this are collected in Keeton, *Extra-territoriality in China*, Chapter XI.

they described necessarily belonged to the rulers. In Machiavelli and in Bodin this was axiomatic, and this hypothesis gave added weight to the theory of the "divine right of kings." The ruler, from the very definition of his authority, could be responsible to no earthly power. His responsibility was to God alone, and the Divine, or Natural Law was a moral precept, not a legal limitation upon Sovereignty. From this conception of absolutism, there was in the seventeenth century, particularly in England, a reaction in political speculation, following hard upon the struggle between King and Parliament. One phase of that reaction is illustrated by the *Leviathan* of Thomas Hobbes. With him political power is still absolute and uncontrollable, but it is no longer inherent in the person of a single individual. It can be enjoyed by a group, and so, in England, for the divine right of the monarch there came to be substituted the divine right, or sovereignty, of Parliament. This, in turn, gave birth to a rigidly positivist view of law, as being a collection of commands of the legal sovereign backed up by the organised force of the State. The jurist is not concerned with the purpose of law, or with its rightness or wrongness. He merely analyses the precepts laid down by the sovereign authority. Ultimately this conception of law is summed up into a complete doctrine by Austin. Sovereignty according to him has two characteristics: (1) the bulk of a given society must be in a state of submission to a determinate political superior, and further (2), that superior must not be in the habit of obedience to any other human superior. As a necessary result, sovereignty is both illimitable (in the legal sense) and indivisible. A divided sovereignty would lead to confusion. It should be noticed, however, that this last proposition has not gone unchallenged. Some writers have accepted a division of function, with a corresponding division of sovereignty, *e.g.*, between executive and legislature.[1]

[1] Salmond, *Jurisprudence*, 7th Ed., Appendix II.

It is unnecessary to pursue the applications of this theory of sovereignty in the internal affairs of a State to its ultimate implications, but it must be noticed that it broke down the mediaeval system of checks and balances, and left the individual face to face with an all-powerful sovereign State. It has been left to the totalitarian dictatorships of the twentieth century to exploit this position to the utmost limit. Thus, Alfredo Rocco writes:

"The fascist State is the only truly sovereign State, dominating all the forces existing in the country and subjecting all to its discipline. . . . This theory of the sovereign State is really not new, for the whole legal school of public law professes it. This school has always taught that sovereignty is not of the people but of the State, a principle asserted in all the writings of all the teachers of public law, foreign and Italian, and also of our jurists, who then called themselves liberals or democrats in politics, without really raising the doubts implied by the patent contradiction in which they become involved . . . Superiority of ends, supremacy of force: these terms sum up the idea of the fascist State. The new fascist legislation tends to realise this conception of the State."[1]

Commenting on this, Mr. Julius Stone observes: "'Adoration of the State' is not a new occupation. Bodin adored his 'souverain,' Hobbes his 'Leviathan,' Machiavelli his 'prince.' Almost always such a phenomenon is either in reaction from civil dissension or in celebration of the achievement of national unity. Italy has been no exception to the rule. Gentile's *Stato etico* is a rationalisation of the alleged achievement of national unity by Fascism after repeated failures in foreign policy and serious dissension at home. This element of fascist thought has undoubtedly arisen more from the facts than from any pre-existing theories. Nevertheless it is certain that its matter of fact acceptance in Italy in the twentieth century is due to the long and respectable body of authority that

[1] Rocco, *La Transformazione dello Stato*, pp. 18-19.

could be vouched for it, and undoubtedly Machiavelli has influenced Mussolini himself considerably. He figures prominently in Mussolini's list of prophets of Fascism. It is more than probable, too, that the absolutist strains in Hegel, which became real in the policies and diplomacy of Bismarck, were not without influence, though that influence is unavowed. . . .

"It may be true, as Rocco says, that this theory is reminiscent of the whole legal school of public law. It sounds like the theory of the Austinians in England and America, and of Laband and his followers in Germany. But the difference is more significant than the similarity and cannot be over-emphasised. With Austin, for instance, the theory of sovereignty is a theory of the nature of law and of the competence of the State. It is a formal theory, having nothing to do with the ends and purposes of State activity. In fascist thought, however, it is impossible to separate the formal theory of sovereignty from the philosophical theory of the strong State, or more emphatically the *stato etico*."[1]

It may be true, as Mr. Stone suggests, that the Austinians did not seek to harness their theory of sovereignty to any particular political doctrine, but the availability of the theory for exponents of the strong State has always been apparent. Indeed, the theory in origin was born out of the Renaissance strong State, so startlingly unlike any mediaeval political organisation. An English writer in the reign of Elizabeth declared: "A rebel is worse than the worst prince, and rebellion worse than the worst government of the worst prince hath hitherto been."[2]

In this brief statement issue is directly joined between the State and the individual, with all the odds in favour of the State. Only the uprising of popular sentiment, leading to the democratic movement of the nineteenth century

[1] *Theories of Law and Justice of Fascist Italy, Modern Law Review,* Vol. I, pp. 194-195.

[2] *Homily on Wilful Rebellion,* cited Lecky, *Rationalism in Europe,* II, p. 194.

retarded the advance of that political juggernaut the all-conquering State.

It was not only in the domestic affairs of the State that this new theory of sovereignty created new problems. In the international sphere, the difficulties seemed at first to call even more urgently for solution. The period between the discovery of America and the Peace of Westphalia in 1648 was a period of international disorder, rendered acute by the variety of aspirations, religious, economic and dynastic, which were seeking satisfaction. The conduct of wars during this period by mercenary armies, in place of the earlier feudal levies, was accompanied by an outburst of brutality unknown since the Dark Ages, and only possible because the earlier restraints upon welfare had broken down. When States rejected the authority of the Church in secular matters, and when they asserted a self-interest which denied any identification with a more universal interest in the welfare of mankind as a whole, a reversion to every conceivable type of barbarism was not altogether unexpected. As Grotius says in the *Prolegomena* to his *De Jure Belli ac Pacis*:

"I saw prevailing throughout the Christian world a license in making war of which even barbarous nations would have been ashamed. Recourse was had to arms for slight reasons or no reason; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were thenceforth authorised to commit all crimes without restraint."

To this a leading modern textbook on International Law adds:

"When his book was published, the worst horrors of the Thirty Years' War had not taken place. The sack of Magdeburg, the tortures, the profanities, the devastations, the cannibalism, which turned the most fertile part of Germany into a desert, were yet to horrify the world. But all this followed in a few years; and men who had lived through a whole generation of wars fitter for

Iroquois braves than Christian warriors were glad to listen when one of the greatest scholars and jurists of the age told them that there was a law that curbed the ferocity of soldiers and bade statesmen follow the paths of honour and justice."[1]

Now Grotius was not the only writer who was seeking to formulate rules governing the external relations of States at this period, nor was he by any means the earliest. His debt to the Italian, Alberico Gentili, who taught at Oxford in the reign of Elizabeth is considerable, while there existed prior to both an important school of Spanish writers, of whom Vitoria and Ayala are the most important, who were working towards the same end, if by rather different methods. Nevertheless, Grotius' writings won general acceptance while theirs did not, and the reasons for this are not far to seek. Grotius skilfully blended one of the most outstanding concepts of mediaeval juristic philosophy with the dominating political concept of his day. He succeeded in finding a formula which reconciled natural law with State sovereignty. Perhaps the reconciliation was not so complete as many of his successors assumed; but it provided the starting point for a body of doctrine which was evolved without serious challenge during the three centuries which followed the publication of his book. The statesmen welcomed Grotius' frank acceptance of the implications of State-sovereignty. They found in him no academic appeal to an outworn concept of world-church and world-empire. That was gone, and in its place was an assembly of independent sovereign States. Those States, however, are bound together by natural law, which supplies a pattern of behaviour which the States are imperfectly attempting to reproduce in their external relations. To this proposition statesmen, canonists, and jurists could alike give their adherence, more particularly because Grotius derived a number of the rules of the positive law of peace from Roman Law, to which jurists

[1] Lawrence, *International Law*, 7th Ed., p. 28.

and canonists alike gave their allegiance, whilst the Statesmen accepted them with complacency because they were favourable to theories of absolute ownership, which the ruler had now come to associate with his control of a defined area, and of the inhabitants within it. Furthermore, Grotius emphasised that International Law was a law between States only and not between individuals, thus directly excluding the internal government of States from its purview and therefore indirectly supporting the irresponsibility of the rulers. Luther has often been condemned for his doctrine of passive obedience, in the sphere of religion, but precisely the same criticism can be brought against Grotius in the sphere of law. In both cases the result of the attitude taken up was to exalt the power of the State and of its rulers.

The effect of this basic attitude has been to make International Law a formal science, accepting the concept of State-personality without enquiry, and refraining from investigating what sociological reality lay behind it. "Primarily," says Hall, in the first chapter of his treatise on International Law, "international law governs the relations of such of the communities called independent States as voluntarily subject themselves to it. . . . The marks of an independent State are, that the community constituting it is permanently established for a political end, that it possesses a defined territory, and that it is independent of external control. It is a postulate of these independent States which are dealt with by international law that they have a moral nature identical with that of individuals, and that with respect to one another they are in the same relation as that in which individuals stand to each other who are subject to law. They are collective persons, and as such they have rights and are under obligations."

It followed from this that International Law must always remain an imperfect law in the sense that it lacked an exterior coercive sanction, for if such a sanction existed,

the States would have lost their independence, and the existing fabric would be replaced by some other—perhaps by a world administration. The very profundity of such a change served to keep it in the furthest background, and so in the existing framework of International Law States found a formidable theoretic defence of their existence and continuance. Accordingly, the blunt Austinian deduction that International Law was not law at all since it was not based on coercion was largely ignored, since it merely emphasised the weakness of the underlying assumptions of that law. If States chose to act habitually in a quasi-legal fashion, that was the convincing proof of the existence of law. This argument is put with some emphasis in the Introductory Chapter to Hall's treatise. After appealing to the Historical School of Jurisprudence for the confirmation of his view that not all law is expressible in terms of a command, Hall adds:[1]

> "Even supposing the view to be erroneous that the body of international usages constituted a branch of law from the time at which it first acquired authority, the fact that States and writers have acted and argued as if it were law cannot but affect the nature of the rules which now exist. The doctrines of international law have been elaborated by a course of legal reasoning; in international controversies precedents are used in a strictly legal manner; the opinions of writers are quoted and relied upon for the same reason as those for which the opinions of writers are invoked under a system of municipal law; the conduct of States is attacked, defended, and judged within the range of international law by reference to legal considerations alone; and finally, it is recognised that there is an international morality distinct from law, violation of which gives no formal ground for complaint, however odious the action of the ill-doer may be. It may fairly be doubted whether a description of law is adequate which fails to admit a body of

[1] Pp. 14-15 (8th Edition).

> rules as being substantially legal, when they have received legal shape, and are regarded as having the force of law by the persons whose conduct they are intended to guide."

These arguments seem to the present writer extremely unconvincing, for as he has observed elsewhere: "Theology was at one time developed by legal methods, and the whole problem of salvation was resolved by some mediæval writers into a lawsuit between Christ and the Devil—but this did not make Theology positive law."[1]

There exists, it is true, a totally different approach to International Law. The naturalists declare the existence of inherent natural rights in States, and then discuss the usages of society in the light of those pre-existing rights. Such theories, though formerly influential, have recently commanded little support, since there is a lack of unanimity among writers concerning the nature and scope of natural rights, and further because States as a whole showed little disposition towards giving objective realisation to such rights, except where they coincided with self-interest. As an ideal, the theory of natural law and natural rights will probably always be influential, but it is an inadequate basis upon which to erect rules which are regarded as having binding force among States.

International Law, it has been seen, accepts the two principles of the absolute independence of states in the international sphere, and their voluntary subjection to the law. These two principles are obviously complementary, and they lead to certain other conclusions which held good so long as "orthodox" International Law was generally applied. Of these conclusions, the first was that International Law has nothing to do with internal changes in the structure of a State. Its personality is unchanged by revolutions or changes in the form of government in a State; and therefore this in turn led to the obligation to refrain

[1] The Austinian Theories, p. 27.

from intervening in the internal affairs of another State unless some vital interest of the intervening State was threatened. This "live and let live" principle could only operate without serious strain in a reasonably orderly and stable international community, where the members were not only upon a footing of legal equality, but also of roughly equal political potentiality.

Now that the whole of the world is parcelled out, so that there are no new fields of enterprise open to the more active States, the problem of redistribution of territories has for the first time become acute, more particularly since two great Powers, Germany and Poland, both with considerable potentialities for expansion, find themselves confined exclusively within relatively narrow territorial limits in Europe. Finding themselves denied an outlet by the absence of any effective machinery of peaceful change, some of the restricted Powers have renounced the principle of non-intervention, and have deliberately interfered in the internal affairs of other members. There have been other reasons for the abandonment of this fundamental principle of International Law in recent years by Italy, Germany, Russia and Japan, and of these the desire to extend the influence of the ideologies upon which their present State-organisation is based is of importance, but chiefly as an instrument of power-politics. It is beyond the purpose of this work to analyse the reasons which have led to the abandonment of the principle of non-intervention. It is sufficient to notice the development, and the serious threat which it implies to the whole fabric of International Law in its traditional form. Regarded from the legal point of view, this recent development has done no more than push the Hegelian conception of the strong State and positivist theories of sovereignty to their logical conclusion. Advocates of the new practice in International Law would argue that whilst formerly it might have been in the interests of the State to agree to set limits upon the exercise of its sovereignty for the purpose of establishing

traditional law, it is no longer in the interests of some States, and therefore in the exercise of their undoubted sovereign rights, they have withdrawn their consent, and have resumed complete liberty of action in the international sphere. In other words, the successive withdrawals of Japan, Germany and Italy from the League of Nations may be regarded as symbolical. They have withdrawn, not only from the recently created League, but also from the community of States whose dealings are regulated by International Law.[1] All the old rules of international intercourse have broken down, and as yet we are at sea with regard to first principles. There is an almost exact parallel with the condition of international intercourse before the establishment of International Law on the Grotian foundation, and once again the worst excesses are visible both in the conduct of wars and in the general relation of States with one another. No other principle but expediency governs the relations of States, with the result that all live in a condition of increasing insecurity —in fact, in that state of fear which Thomas Hobbes declared to be the true state of nature existing before the establishment of orderly government in human society. Hobbes, it will be remembered, lived through the long period of civil disorders in seventeenth century England, and was not unnaturally impressed by the confusion which ensued when respect for law had disappeared as a result of the weakening of the coercive sanction. To-day it may well be that only a few States have launched an open

[1] It should be noticed that a Rescript of the Emperor of Japan, dated March 27th, 1933, says: "By quitting the League of Nations and embarking on a course of its own, our Empire does not mean that it will stand aloof in the extreme Orient nor that it will isolate itself thereby from the fraternity of nations." Japan's later actions, however, show that this isolation is now an accomplished fact; and indeed, the great bulk of modern Japanese political philosophy is based upon acceptance of that isolation, and a declaration that Japan is seeking to become the centre of a new organisation of Far Eastern States, having no political point of contact with any Western system. This is a striking reversion to exceedingly ancient Oriental pretensions, which China was only compelled to renounce at the end of the nineteenth century.

challenge against international order, as it has been conceived from Grotius' day until our own times, but unfortunately in international relations in the past the respect which is paid to order is ultimately governed by the attitude of the least law-abiding Powers, since in the long run they compel other States to accept their own viewpoint, if only for the purpose of self-preservation.

Another principle upon which "orthodox" International Law is obviously based is that agreements solemnly undertaken must be fulfilled. International contracts, when violated, could give rise to no other right than ultimately a right to use force to attempt to secure redress, but it was generally recognised that unless reliance could be placed upon the pledged word, the whole fabric of international intercourse would necessarily collapse. So far was this principle carried that it even governed treaties concluded through the exercise of force on the part of one of the signatories—an obvious departure from private law principles, which was always treated with some reserve by the text-book writers. At times, the community of States went to considerable lengths to secure apparent conformity with this principle. During the Franco-Prussian War, Russia seized the opportunity thus presented to repudiate those clauses of the Treaty of Paris of 1856 which denied access to the Black Sea for her warships. After the war a conference was held, which solemnly affirmed that "it is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement," following which Russia was formally granted the right she had claimed unilaterally to assert. Hall's comment upon the episode is instructive. He declares that the force of the declaration "may have been impaired by the fact that Russia, as the reward of submission to law, was given what she had affected to take. But the concessions made were dictated by political considerations, with

which international law has nothing to do. It is enough from the legal point of view that the declaration purported to affirm a principle as existing, and that it was ultimately signed by the leading powers of Europe."[1]

No more categoric assertion of the abstract nature of "orthodox" international law has ever been made.

However, there were signs in the latter part of the Nineteenth Century that this principle was being subjected to considerable strain, and in consequence, the theory of *rebus sic stantibus* was cautiously enunciated. This theory suffered, however, from the serious defect that it proved impossible to define what was implied in a change of fundamental underlying circumstances, and since there existed no international tribunal which was competent to define such a change of circumstances, in a specific cause, invocation of the theory invariably provoked opposition by the other party to the compact, so that the whole theory was on an uncertain footing before 1914. Moreover, the unilateral annexation of Bosnia and Herzegovina by Austria in 1908, in clear breach of the Treaty of Berlin, indicated that altogether apart from the doctrine of *rebus sic stantibus*, respect for the pledged word was weakening, and Hall's comment on this episode that "the failure of Europe to take collective action on behalf of its solemn obligations did more to impair the values of International Law as a restraining force on public conduct than any event of recent years"[2] seems entirely justified. In the War of 1914-1918, of course, there were repeated violations of treaty obligations, beginning with the non-

[1] Pp. 412-413 (4th Edition).

[2] P. 368, c.f. Vallel, *Law of Nations*, Ed. Chitty, p. 229. "He who violates his treaties, violates at the same time the law of nations; for, he disregards the faith of treaties—that faith which the law of nations declares sacred; and, so far as depends on him, he renders it vain and ineffectual. Doubly guilty, he does an injury to his ally, he does an injury to all nations, and inflicts a wound on the great society of mankind. 'On the observance and execution of Treaties,' said a respectable sovereign, 'depended all the security which princes and states have with respect to each other; and no dependence could henceforward be placed in future Conventions, if the existing ones were not to be observed.'"

recognition of Belgian neutrality by Germany in 1914. These were justified on one of two main grounds, either as examples of state-necessity, or as reprisals for prior violations of treaty obligations. While it may be said that violations of the principle in time of war are perhaps not such direct threats to international order (which is temporarily in abeyance) as the action of Austria-Hungary in 1908, yet it cannot be denied that cumulatively their effect has been very great, for they have paid homage to the conception of State Sovereignty, to be preserved at all costs, from which the extreme doctrines of post-war years have been no more than obvious developments. The final result was the repudiation by Germany of successive portions of the Treaty of Versailles, by Italy of the Covenant of the League in her invasion of Abyssinia and Albania, and by Japan of the Covenant and the Washington Treaties in her invasion of Manchuria in 1931 and again in her invasion of China proper in 1937. It is not overlooked that in each of these recent and flagrant illustrations of treaty-violation there may be deeper underlying causes, explaining though not justifying these actions, and that the absence of effective machinery for peaceful change may have been in part responsible for these direct challenges to international order. Nevertheless, when due allowance has been made for this, the conclusion is irresistible that a law whose only sanction is the right of resistance against an aggressive law breaker is scarcely worthy of the name "law" at all, in an era when such challenges have become commonplaces.

Such a conclusion acquires added force when the third underlying principle of the traditional law is analysed, *viz.* that in the absence of universal compulsory machinery, "war is the litigation of States." Bad as it was in usage, the traditional law was compelled to accept the fact of war, and following the lead which Grotius had given, could do no more than seek to mitigate its effect by elaborating rules for its proper conduct. Indirectly, therefore, the

writers have set the seal of legality and normality upon warfare, instead of treating it as a breach of international order, which all parties were actively interested in terminating at the earliest possible moment. This would have involved greater emphasis being placed upon peaceful methods of settling international disputes, and a firmer advocacy of mediation and arbitration. Instead, the text-book writers, after very properly discarding the fruitless discussion of the distinction between the just and the unjust war, allowed themselves to be side-tracked into an equally profitless discussion of the legality of the various methods by which wars could be waged. In this discussion they have done little more than re-define, in quasi-legal terms, the successive developments in the art of warfare which have taken place during the last three centuries. Where they have done more, their labours have been ineffective, as the fate of the Hague rules during the war of 1914-1918 showed. To-day, when a new World War seems an imminent probability, it is assumed on all sides that the humanitarianism of the Hague and similar Conventions will be generally disregarded, as indeed they have been in the civil war in Spain, in hostilities in China, and in Abyssinia. There is an ironical significance in the fact that countries such as China and Abyssinia, which were among the latest to be admitted within the community of nations, have been the first to experience the horrors of relapse into barbarism, which is accompanying the disintegration of that community. It is plain that for the future the international lawyer must adopt a more positive attitude to war than he has done in the past, and instead of regarding it as a regulated contest between two litigants, he must define it for what it is, a direct threat to the well-being of the international community, substituting brute force for the appeal to reason, and solving no problem of international intercourse. The fate of large sections of the Treaty of Versailles, within twenty years of its conclusion, lends potency to this argument.

A fourth principle underlying traditional International Law is that it is a relation between sovereign independent States, with perhaps the addition of a few analagous, but slightly anomalous communities. The individual as such had no existence in the international sphere. He was swallowed up in the personality of his State. Sociologically, this has probably worked untold harm. It has thwarted the development of consciousness of the international community, notwithstanding the rapid multiplication of means of transport and communication, and the increasing economic interdependence of units in that international community. It has permitted statesmen and publicists to personify abstractions, and endow them with characteristics, so that "Britain," "Germany," and "France" have come to enjoy mythical attributes as collectivities, and the identification thus made has been exaggerated in the mind of the individual citizen and has thus formed a fruitful source of international discord, obscuring the real sources of international unrest. Furthermore, it has sanctified authoritarianism, and has so given birth to exaggerated theories of State-right not only in the international, but also in the domestic sphere, leading to the regimentation of educated human beings upon a scale, and with a thoroughness not paralleled in the world's history, and this regimentation has been rendered the more formidable by the prodigality of the resources at the disposal of rulers. Such regimentation is by no means confined to "totalitarian" States. In the so-called democracies of Western Europe and the United States, it is less evident because the technique is less crude, but it exists, nevertheless. Such a refusal to disintegrate States into the individuals for whose well-being they exist has in itself, then, increased the difficulties of international intercourse, whilst the irresponsibility of the State to the individual in International Law has given to the State, or rather to those who temporarily control it, a dangerous and intoxicating immunity from control which upon occasions has been

grossly abused. Finally, the personification of abstractions has made it possible for international relations to be conducted in accordance with a standard of morality, based upon a narrow conception of the States material self-interest, which has long since been abandoned for the individual. In such an atmosphere, the employment of war as an instrument of national policy has been regulated only by the necessity of organising public opinion in support of the proposed course, which in turn has given rise to one of the most fertile causes of modern international misunderstanding—a comprehensive and unscrupulous system of propaganda permeating the whole social structure of the modern State. If, however, the reality of the international community be accepted (and a later chapter will be devoted to a discussion of its existence), the responsibility of a State for conduct prejudicial to the welfare of that community necessarily follows.

A further principle implicit in the traditional International Law is that it depends upon the acceptance by the member States of a common outlook upon the main problems of international intercourse.[1] This depended ultimately upon the unity underlying Western Civilisation as the legatee of Graeco-Roman political ideals, and it manifested itself in an acceptance of Roman Law conceptions governing the acquisition of territory by States, by ideas of individual (as distinct from collective) responsibility for wrongful acts, by more or less definite theories of judicial impartiality, of equality before the law, and finally by a vague sentiment towards humanitarian individualism in the internal government of a State. In the sphere of jurisprudence and politics there was much genuine Free Trade in ideas, due to the acceptance of a common tradition, and it was upon these foundations that an acceptable International Law was based. Without it, the Grotian theory of International Law was not a workable reality. So much was implicitly accepted, for it is significant that

[1] Cf. Friedmann, *Contemporary Review*, July, 1937, p. 63.

when non-Christian States were admitted within the family of nations, a necessary condition precedent was proof of certain characteristics that would bring them into practical harmony with such a basic outlook. Lawrence puts the point very clearly; he says:

> "It is impossible for States to take part in modern international society when they are unable to realise the ideas upon which it is based. No attempt has ever been made to define the exact amount of affinity in modes of life and standards of thought which must be regarded as essential. Each case is settled on its own merits. The area within which the law of nations operates is supposed to coincide with the area of civilisation. To be received within it is to obtain a kind of international testimonial of good conduct and respectability; and when a State hitherto accounted barbarous desires admission, the powers immediately concerned apply their own tests."[1]

There is something a trifle ludicrous in applying the epithet of "barbarous" to States such as Turkey, China or Japan immediately prior to their admission within the family of nations, but the significance of Lawrence's observations is otherwise clear enough. Conformity to the law is not sufficient. There must be acceptance of the fundamentals upon which that law is based. Without it, since the law is based on consent, there would be no guarantee at all that it would be observed. That is logical, and in this form has been generally recognised. Some of its implications, however, have been less clearly recognised. Since International Law only applies among members of the international community, where a member is dealing with a State outside that community, the member's conduct is based purely upon expediency.[2] There is, in fact, no common basis upon which relations can be conducted,

[1] P. 50.

[2] Holland, *Jurisprudence*, 13th Ed., p. 433.

and the position resembles that existing before the foundation of International Law in the seventeenth century. The difficulty was repeatedly experienced by foreign statesmen in their dealings with China in the first half of the nineteeth century. Again and again they declare that dealings with China upon a civilised basis are impossible, since China denies the basis on which they would rest. China claims universal overlordship, instead of recognising the equality of States before the law; as a necessary consequence, whatever arrangements she makes with foreigners are exclusively matters of grace on her part, to be terminated at will by her alone; she denies the principle of individual responsibility, and so forth. In the case of China, the Western attitude ultimately prevailed, and eventually she sought admission to the family of nations and the sphere of international law on terms dictated by the Western Powers, and as a result, the framework of the traditional law was temporarily strengthened. To-day, however, the challenge to International Law from this point of view is nearer at hand. Immediately after the war, it was faced with a threat from Soviet Russia, denying as she did any community of ideals with the West. Once again the threat passed, and by her entry into the League of Nations Russia signified the renunciation of her attack upon the law. More recently, however, Germany and Japan have directly repudiated the accepted bases of International Law. In the case of Japan, this is simply a rather rapid reversion to her traditional attitude, as it existed before her entry into the Western orbit. To-day she is once again an outlaw from the standpoint of the orthodox law, glorying in her isolation, and basing her international intercourse on expediency. Germany, for her part, rejects the conception of a common European tradition in Western civilisation, and her present political philosophy rests upon an assumption of racial pre-eminence which finds expression in the activities of the almost deified race-State. With such an attitude, there can be no acceptance

of the principle of equality before the law, nor of the binding character of treaties, nor of any of the other assumptions upon which the traditional law rests. The attitude of these two States represents the most serious threat to international order which has emerged in modern times, and since that attitude is shared to a substantial degree by Italy, it is a little doubtful how far the conception of the binding force of International Law, in the traditional sense, can usefully be preserved at the present time.[1]

[1] For a detailed examination of this problem of Friedmann, *Modern Law Review*, Vol. II, p. 194, *et seq.*

CHAPTER III

The Development of International Organisation

Although, as we have seen, the International Law which was established among European nations after the Peace of Westphalia, and which was subsequently extended to all the civilised States of the world, was based upon the consent of independent, sovereign States, and although numerous writers upon International Law pointed out that so long as that basis was preserved, no certain sanction was possible, nevertheless a succession of projects for a super-State organisation to uphold the law were elaborated. Some, however, were no more than the products of idealists, with no chance of immediate practical realisation. Amongst these must be classed William Penn's *Essay towards the Present and Future Peace of Europe*, Kant's project for a confederation of civilised States and William Ladd's essay on *A Congress of Nations*.[1] Such proposals were not the consequence of the establishment of International Law upon the Grotian foundation, for there have been similar schemes ever since lawyers and philosophers became conscious of the imperfections of international order; amongst older projects, those of Dante and Pierre Dubois immediately spring to mind.[2] The idea of international justice, and of an international authority to enforce it, is thus an idea distinct from the conception of International Law as it has existed in Europe during the

[1] Upon which, see Dr. Schwarzenberger's monograph: *William Ladd*, in particular Chapter III where Ladd's plan is compared with earlier projects.

[2] Upon these and many other proposals, see Elizabeth York, *Leagues of Nations: Ancient, Mediaeval and Modern*, and Lord Davies, *The Problem of the Twentieth Century*, Chapter II.

past three centuries, and is in no sense the product of that law. Sometimes, indeed, the two concepts have appeared to be lacking in harmony, exactly as in the earlier period, the conception of international order and justice was not always identifiable with the conception of a united Christendom, whose heads were the Pope and the Emperor. A number of the projects elaborated at various times were Utopian, in the sense that they were products of abstract thought and were not based upon the contemporary political organisation either of Europe or of the world,[1] but all of them have left some impression, even if very slight, upon subsequent thought. William Ladd very wisely said of his own project:

> "That this attempt, or even a dozen more, should prove abortive on account of defects in their machinery or materials ought not to discourage us, any more than the dozen incipient attempts at a steamboat, which proved abortive for similar reasons, should have discouraged Fulton. Every failure throws new light on this subject, which is founded on the principles of truth and equity."[2]

After all, the conception of the peaceful organisation of mankind, and that of international justice, are two ideas, both products of a mature civilisation, which fortunately will not die.

Besides the schemes of philosophers, for the most part disinterested but insufficiently concerned with practical difficulties, there were also the schemes of diplomatists and statesmen, more modest in conception, and designed to achieve some practical end. Among these must be classed that of Sully, minister of Henri IV, the ultimate object of which was to fetter the power of the Hapsburgs. A later political project of a similar type was the Holy Alliance,

[1] Cf. Gustav Hugo, *Das Naturrecht*, mentioned by Schwarzenberger, *op. cit.*, p. 24.
[2] Schwarzenberger, *op. cit.*, p. 78.

established after the Congress of Vienna. The real basis of that association may be described as a desire to stabilise the system established in 1815, protect dynastic interests, and to preserve the peace of Europe by suppressing threats to it either of an ambitious member, seeking to overthrow the Balance of Power, or by rebellious communities within States whose boundaries had been fixed in 1815. The system eventually collapsed under the assaults of nineteenth century nationalism, and supplied an object lesson upon the futility of seeking to give a permanent validity to a temporary phase of international development. Nevertheless the same error was repeated when the League of Nations was established a century later. The League was regarded as a bulwark of the Treaties, with the result that the United States refused to participate,[1] while those States who had been defeated in the War of 1914-1918 or whose aspirations had been frustrated at the Peace Conference refused to regard the League as international machinery worthy of their loyal support. To-day there is a real danger that the League may come to be generally regarded as based upon an attitude towards international affairs as outmoded as that upon which the Holy Alliance was founded. New forces and new ideals have arisen, and the League has failed to solve the problems which they have created. For that the League cannot be blamed, for it has not been permitted to evolve a technique of its own, divorced from the national policies of the States most influential in its deliberations. For all that, it has been compelled to suffer much unmerited blame, even in those communities which have profited most by its existence.

In the second half of the nineteeth century, efforts to settle international disputes, especially those in which European powers were interested, were made by means of congresses of national representatives, as a result of which

[1] Actually, it is probable that the majority of the American voters in 1920 were in favour of joining the League; see Lord Davies, *The Problem of the Twentieth Century,* and S. Colcord, *The Great Deception.*

what is generally known as the " Concert of Europe " came into existence. Some of these congresses appeared to achieve strikingly successful results; for example the Congress of Berlin, in 1878, in which Russian designs in the Balkans were apparently thwarted for thirty years. A wider view of the issues involved in this conference, however, will probably lead to the conclusion that its successes were more apparent than real, for it placed Bosnia and Herzegovina under Austrian protection, leading directly to Austro-German penetration into the Balkans, and thus eventually, to the war of 1914-1918. Another illustration of this system in action, and again with considerable success, was the Berlin Conference of 1885, at which Africa was partitioned among the European powers. Other conferences were less successful, although their failure was usually hidden behind some general formula. A high authority has observed of the system as a whole:

> " Proposals to hold European conferences were not, however, always accepted. As to those which actually met, it might be rash to say positively that in any case war otherwise imminent was averted. A conference of plenipotentiaries may really settle a troublesome question, or may gain time for a more complete settlement by some transitory compromise, or may give the sanction of a formal treaty or declaration to changes known to all parties to be inevitable."[1]

It is important to appreciate that the Congress system was in no sense a new organ for the achievement of international order. It accepted to the fullest extent the existing consent-basis of International Law, and thus proved extremely acceptable to statesmen and diplomatists, by preserving their irresponsibility, both externally and legally. Congresses, that is to say, were of political significance only, and it will be shown in a later chapter that the survival of the " congress " habit of mind has proved one of the

[1] Sir Frederick Pollock, *The League of Nations*, 2nd Ed., p. 13.

most serious obstacles to the evolution of the League of Nations. Statesmen who attended sessions of the League Council or Assembly have more frequently regarded themselves, and have been urged by the Press of their respective countries to regard themselves, as plenipotentiaries, putting forward their national point of view, instead of delegates to an international organisation, and it is significant that after the failure of the one attempt to make international organisation a reality, there has been a concerted attack upon the one article, Article 16, which sought to make the League something more than a permanent Congress, and the reduction of which to an optional basis at the Assembly of the League in September, 1938, is a retrograde step of very great importance. Statesmen and diplomatists, that is to say, feel themselves freer to prosecute national interests in a "congress" atmosphere, and have therefore eagerly accepted the failure which they themselves engineered, in order to destroy an institution in which they never sincerely believed, and the downfall of which they have hailed with relief. In this they have, of course, been supported by those elements in their national Press which desire unfettered State action based ultimately upon State force, elements which are unfortunately still predominant even in democratic countries.

Besides the Congress system, which, it has been suggested, was no real contribution to international order, there were two other movements prior to 1914 which contributed towards this end. One of them emphasised the increasing interdependence of States, the other sought to provide some alternative to war as a means of settling international disputes. The first movement cautiously laid the foundations of international administration, although this was distributed among such a miscellaneous collection of bodies that its significance was only appreciated by the expert; and the moral, that State sovereignty was a hindrance to international well-being, instead of a help, in many modern questions of direct concern to individuals, was rarely, if

ever drawn. This development was a striking testimony to the growth of international consciousness, in spheres where national rivalries could, from the very nature of things, have little play. Thus there existed before the War the Universal Postal Union, the International Bureau at Zanzibar for the suppression of the Slave Traffic, the International Union for the Protection of Industrial Property, the Danube and Suez Canal Commissions, the Institute of Agriculture, the International and Radio-Telegraphic Bureau, the International Railway Bureau, and a number of similar organisations. It must be pointed out that so often as a State adhered to one of these conventions, it limited its sovereignty in conformity with the decisions of the international bureau during the period of its membership, and the steady growth of these international organisations may therefore be regarded as the first practical inroad upon State absolutism in response to the consciousness of the growing needs of the international community. Since the establishment of the League, a number of these international bureaux and commissions under Article 24, have been placed under League control,[1] and new organs of international administration, such as the International Labour Office, have come into existence. It is noticeable, moreover, that whatever criticism the League may have incurred in its efforts to elaborate machinery for the overthrow of an aggressor, no adverse criticism of any weight has been directed against the activities of the League under Article 24, and indeed, even non-members of the League have found it expedient to co-operate with members in these activities. Inasmuch as the increasing interdependence of States from the standpoint of communications, raw materials, currency, and so forth, ought logically to lead to an increase of such international organs in the future, even if the present onslaught upon the

[1] Actually, five international bureaux have been placed under the direction of the League. Even here, League members have shown reluctance to foster the work of the League.

political activities of the League should continue, this retrogressive action could not defeat, but could only delay, the movement towards international organisation.[1] The world has already become so much of a unity from the standpoint of many human activities that a return to politico-economic isolation cannot appear as anything more than an ill-judged effort to deny the obvious consequences of human progress during the last century.

The second movement which requires notice was that which led to the more frequent employment of arbitration as an alternative to war in the settlement of international disputes. Pre-War text books were accustomed to ascribe this to a growth of respect for law among States, but an investigation of the conduct of States before 1914 lends little support to this view. The repudiation of the Treaty of Paris of 1856 by Russia in 1870, and the annexation of Bosnia and Herzegovina by Austria-Hungary in 1908, to give only two examples, are not evidence of any perceptible respect for the law by two great Powers, and these two episodes are unfortunately not isolated examples. A sounder reason would appear to be a recognition by States of the increasing costliness of warfare, and a desire to avoid the dislocation of national life which it entailed, unless a vital interest was threatened. It is customary to refer to the Washington Treaty of 1870, between the United States and Great Britain for the settlement of the Alabama dispute, as the first of the modern arbitration treaties,[2] and it is significant that that treaty, ending as it did a dispute which had been the cause of profound distrust between the two English speaking peoples, was signed when the full

[1] This co-operation is likely to be maintained or even increased in technical matters, *e.g.*, communications and traffic, whereas matters which affect the social life of the community are bound up with the community of standards among the nations which is now becoming less evident.

[2] The Jay Treaty between Great Britain and the U.S.A. in 1794 should not be overlooked, since this was followed by a number of arbitration treaties between the Latin-American countries in the first quarter of the 19th century.

consequences of the long drawn out American Civil War had become apparent. The dispute involved no vital interest on either side, and it therefore seemed folly to the Statesmen of both nations to permit the source of irritation to remain.

The success of the Alabama arbitration led directly to the signature of a number of other arbitration treaties, and notably to the signature by twenty-four States in 1899 of a Hague Convention establishing a Permanent Court of Arbitration, to which States might have recourse for the settlement of their disputes. The Convention was revised and extended at the second Hague Peace Conference in 1907. The Permanent Court, it should be added, was no more than a panel of arbitrators from which the disputants could select a tribunal, and its jurisdiction was compulsory only for the most minor matters. Nevertheless, the Court performed a great deal of useful work, mainly because numerous States signed arbitration treaties on the lines of that concluded between England and France in 1903. By that Treaty the contracting parties agreed that questions of a judicial character relating to the interpretation of treaties, if found incapable of settlement by diplomatic means, should be referred to the Court of Arbitration. Even where the terms of agreement were a little more general in character than this, however, it was customary to exclude all matters affecting national honour or vital national interests, on the broad ground that an agreement so wide in its terms would be a serious impairment of national sovereignty. By 1915, the United States was able to enter into treaties with about thirty other States, including Great Britain, France, Italy and Russia, providing for a reference of all disputes of whatever kind, except those otherwise dealt with by existing agreements, to a permanent international commission, which was to be set up; and the parties agreed not to declare war or to begin hostilities until the report of a fact-finding commission of investigation had been completed.

Arbitration was a most valuable addition to the machinery of peace,[1] but its limitations have already been noted. It could only operate under *ad hoc* agreements, and States made a reservation of questions affecting national honour and vital interests, thus giving rise to the well-known distinction between justiciable and non-justiciable disputes, upon which an extensive literature has grown up.[2] The whole basis of the distinction, however, was that a State's vital interest is entitled to priority over the welfare of the entire international community. In municipal law, such a supposition has been obsolete for many centuries. In the international sphere, the recognition of the fallacy of the hypothesis is only slowly gaining ground, although there has been in the last few years a much clearer perception that the existence of a state of war between two or more nations more adversely affects the members of neutral countries than before 1914, especially since increasing difficulty in localising disputes (illustrated by the history of the Non-Intervention Conference upon the Spanish Civil War) is experienced. If there is to be any genuine advance towards international security, it must be generally recognised that all disputes between States are capable of settlement by pacific means.[3] For some, the strict procedure of litigation before the Permanent Court of International Justice is appropriate, for others, the procedure of arbitration, and for others again, settlement by some less formal tribunal, bound to administer a species of international equity may be appropriate. Any resort to war, or to war-like measures, threatening as it does the welfare of the international community as a whole, requires prompt outlawry and suppression by some international authority.

[1] It was, of course, not a nineteenth century product, having been employed in ancient times, but its employment in the nineteenth century was, in fact, a fresh beginning.

[2] For a full survey see Oppenheim, *International Law*, 5th ed. by Lauterpacht, Vol. II, and Lauterpacht, *Function of Law in the International Community*.

[3] For a searching investigation of the legal problems, see Lauterpacht, *Function of Law in the International Community*, Part III.

This, as will be shown, was the intention of the framers of the League Covenant, but their intentions foundered upon the rock of State sovereignty. If any fresh attempt is made to establish an international order based upon the rule of law, recognition of this fact may avert a second failure.

CHAPTER IV

The League Covenant and State Sovereignty

It is scarcely a matter for surprise that the prosecution of a major war brings with it a general desire among both belligerents and neutrals for some more secure form of international organisation than has been elaborated previously. Thus the Revolutionary and Napoleonic wars were responsible for the Holy Alliance, whilst the later stages of the war of 1914-18 produced a heavy crop of literature advocating the establishment of a League of Nations. Whereas only a few years before many publicists thought that the Hague Peace Conferences had ushered in a new era in international relationships, during which mankind could look forward to long periods of unbroken peace and steady material progress, and while they were unanimous that the respect for international law was firmly based upon a public opinion whose censure would be sufficient to deter the potential lawbreaker, the war had made it necessary to abandon these doctrines, which were in fact no more than a late outcrop from a School of Jurisprudence whose underlying philosophy was the progressive evolution of the human race towards increased law-abidingness.

The newer movement for the closer association of States may be regarded as having been launched at the foundation of the American League to Enforce Peace at Philadelphia in June, 1915, closely following a weighty address by President Taft upon the same topic. In view of the recent history of Article 16 of the Covenant of the League, it is enlightening to observe that this meeting framed four main points only for a future League. The

first declared that all justiciable questions should be submitted to an international judicial tribunal, the second added that all other disputes not settled by negotiation should be submitted to a Council of Conciliation for decision and the third article ran:

> "The Signatory Powers shall jointly use forthwith both their economic and military forces against any one of their members that goes to war, or commits acts of hostility, against another of the signatories before any question arising shall be submitted as provided in the foregoing."

In order that there should be no misconception concerning this article, the American League added the following interpretations:

"The Signatory Powers shall jointly employ diplomatic and economic pressure against any of their members that threatens war against a fellow signatory without having first submitted its dispute for international inquiry, conciliation, arbitration, or judicial hearing, and awaited a conclusion, or without having in good faith offered to submit it. They shall follow this forthwith by the joint use of their military forces against that nation if it actually goes to war, or commits acts of hostility against another of the signatories before any question arising shall be dealt with as provided in the foregoing."

The fourth article provided for Conferences for the codification of international law.

The entry of the United States into the war naturally brought this question more prominently before the Allied Powers, and there was a considerable body of opinion in several Allied States prepared to support it. Indeed, already at the beginning of 1917, the Allied Powers had signified to President Wilson their wholehearted agreement with the proposal to create a League of Nations, recognising the benefit which would accrue "from the institution of international arrangements designed to prevent violent

conflicts between nations so framed as to provide the sanctions necessary to their enforcement, *lest an illusory security should serve merely to facilitate fresh acts of aggression.*"[1] Unfortunately the moral of the last observation has been somewhat quickly overlooked. How necessary it seemed in 1918 is shown by Lord Curzon's speech in the House of Lords on June 26th, 1918, defining the attitude of the British Government towards the proposed League. He said:

> "We must try to get some alliance, or confederation, or conference to which these States shall belong, and no State shall be at liberty to go to war without reference to arbitration, or to a conference of the League, in the first place. Then if a State breaks the contract it will become *ipso facto* at war with the other States in the League, and they will support each other, without any need for an international police, in preventing or in repairing the breach of contract. Some of them may do it by economic pressure. This may apply to the smaller States. The larger and more powerful States may do it by the direct use of naval and military force. In this way we may not indeed abolish war, but we can render it a good deal more difficult in the future. These are the only safe and practicable lines at present, and the lines upon which the governments are disposed to proceed."[2]

A further and fuller expression of the same point of view is to be found in General Smuts' pamphlet, written in the last days of the War, and entitled, *The League of Nations: a practical suggestion.* The great value of this pamphlet is to be found in its conception of the League as a powerful administrative body, supervising the execution of many international undertakings, including that of the government of backward populations in the colonies of ex-enemy Powers. As far as sanctions are concerned,

[1] My italics.
[2] This is substantially an exposition of the Phillimore Plan.

the position of General Smuts was identical with that of Lord Curzon. Resort to war in defiance of undertakings to the League placed the offender automatically in a state of war with all other members of the League, without any declaration being necessary.

The publications of advocates of a League of Nations, as well as the pronouncements of American and Allied statesmen had, therefore, indicated the desirability (and, indeed, the necessity) of establishing a strong League, if the peace was to be preserved, and the history of international intercourse during the last twenty years had abundantly proved that they were right. As soon as the task of drafting the Covenant was undertaken, however, difficulties multiplied, and it became necessary to make compromises, in order to soothe the susceptibilities of important sections of the public opinions of Allied countries, which were by no means happy at the prospect of pooled security or of the prosecution of international disputes before either a judicial tribunal or a council of representatives of member States.[1] Issue was joined at the outset, for when the text of the Covenant was published in this country in 1919, it was accompanied by a *Commentary,* which explains the existence of the League in the following terms:

"It is not the constitution of a super-State, but, as its title explains, a solemn agreement between Sovereign States, which consent *to limit their complete freedom of action* on certain points for the existence of themselves and the world at large. *If the nations of the future are in the main selfish, grasping and warlike, no instrument or machinery will restrain them. It is only possible to establish an organisation which may make peaceful co-operation easy and hence customary,* and to trust to the influence of custom to mould opinion."[2]

This may have been a cautious commendation of the

[1] See Miller, *The Drafting of the Covenant,* Vol. I, p. 4, discussing the conclusions of the Phillimore Committee.

[2] My italics.

Covenant to those reactionary sections of the community who unrepentantly wished to preserve complete freedom of action for this country in the future, but it may on the other hand represent an official retreat from the aspirations which received official blessing in the last year of the war. General Smuts, at any rate, and many others with him, had expected more, and the whole machinery of sanctions against an aggressor had been framed to achieve more.

With such an introductory explanation, however, it was plain that the Covenant itself would show plain signs of compromise between the views of those, who, like General Smuts and President Wilson, wished to see the creation of an effective international authority, with power to prevent wars of aggression, and those who, on the other hand, while sincerely desiring to make the outbreak of war a difficult matter, nevertheless were not prepared to make any substantial concession upon the key issue of state sovereignty, which alone could translate their aspiration into reality. An analysis of the articles of the Covenant will show to what extent the views of this second school prevailed. Article I, by which the League is constituted, is based avowedly upon consent. This, of course, is not fundamental, since the original federation of the States of the American Union was similarly based on consent, but there is a fundamental difference between the two associations. In the United States there was no right of secession, and the American Civil War was fought upon this issue, which involved the further problem, whether the States of the American Union, in federating, had preserved their sovereignty unimpaired. In the League, on the other hand, provision was made for the withdrawal of States on giving two years' notice.[1] Why was this

[1] Wilson thought that a State which withdrew would become an outlaw. Miller, *The Drafting of the Covenant*, Vol. I, p. 345, and Vol. II, p. 358; and Schwarzenberger, *The League of Nations and World Order*, p. 104. Others thought, more correctly, that the right to withdraw altered the whole nature of the League.

provision inserted, unless for the express purpose of preserving complete freedom of action to members in the future? This provision, it is significant to notice, was not in the original draft of the League Covenant. Its insertion shows the extent to which States, in the first months of peace, were already weakening in the desire for the preservation of peace, based upon an effective international authority.

The observations of Sir Frederick Pollock, who pointed out that Article I was important as clearly showing that the League was a concert of independent powers,[1] obviously reflect the view propounded in the official Foreign Office commentary, and unquestionably represent opinions then widely held, both in this country and elsewhere. The machinery of withdrawal has been one of the few parts of the League's machinery which has been thoroughly understood and widely used. In dealing with States, the verdict of history is against Sir Frederick, for by several notable nineteenth century examples, the lesson has been taught that confederations are impermanent structures, whilst federations from their nature are not. Had the views of the opponents of the American Federalists prevailed, the American Civil War would not have been fought, and the United States would not have existed to-day. That the League of Nations has suffered the same fate as the German Confederation established in 1815 need surprise no one. Yet in the second half of the nineteenth century, Germany was unified with a different constitution, this time based on force. It is astonishing that the moral of these two experiments can be so completely overlooked.

One further point in the first Article deserves notice. It provides that any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective

[1] Pollock, *op. cit.*, pp. 97-98.

guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military and naval forces and armaments.

The second part of this provision affords little difficulty, since the League failed to secure disarmament, but it is interesting to note that no attempt was ever made to define in general terms what was meant by an intention to observe its international obligations, which presumably is intended to secure loyalty to the Covenant. As Pollock aptly says, in discussing the article as a whole, it was intended to create a club; but no one has yet seriously contended that even a national State, where there is more identity of interest between members than there was in the League, can be effectively governed on club principles. From whatever point of view the subject is approached, the conclusion is reached that the representatives of the States who accepted the Covenant disliked the idea of the application of force to a recalcitrant member—not because of the inherent dangers of this course, for in 1919, the Allies were all powerful and the emergence of Fascist Italy, modern Japan, and Greater Germany as irreconcilable opponents of the League idea had been contemplated by no one, but because they suspected that it might inconveniently limit their own freedom of action in the future. It was for this reason that they were not prepared to make any real concession upon the cardinal question of State sovereignty. This was the more unfortunate as in 1919 there was an identity of interest among the framers of the League Covenant which has never since been approached. At that time, moreover, the task of making the coercive authority of the League an effective reality would have been incomparably easier than it was, when, belatedly, the League decided to make an experiment with Italy during the Abyssinian expedition.

Articles II, III and IV of the Covenant created the organs of the League—the Assembly, the Council, and the

Secretariat. Two important issues are raised by these Articles, neither of which has received the attention merited by their importance. In the words of President Wilson, the War of 1914-1918 was fought "to make the world safe for democracy." Nevertheless, the Covenant makes no concession whatever to this principle. Representatives of States, both to the Council and to the Assembly, are nominated by the Government of the day without any reference whatever to the peoples of those States. Not infrequently, therefore, the utility of a member's contribution to League proceedings has been seriously injured by the knowledge that he represented a government which no longer fully possessed the confidence of his country. Among the lesser States, this has been a more serious defect than among the Greater Powers, but there have been occasions when the influence of even the French delegates has been limited in this way. From the standpoint of political theory, such a position has always been indefensible. There were, indeed, critics of the League Covenant in 1919 who were puzzled by this decision, but their criticisms received little publicity. Pollock's comment on this point is instructive; he observes: "Independent Powers deal with one another through their Governments and not otherwise. . . . In the strict theory of international law the Government of every State is as regards every other State an indivisible and impenetrable monad."[1] It is interesting to note that originally, in the American constitution, representatives of the States in the National Senate were elected by the legislatures of the States, but since it was found that this indirect election impaired the authority of the Senators, a constitutional amendment substituted direct elections and the result has been a steady increase in the authority of the American Senate.

This fundamental defect could scarcely have been more neatly put. It petrifies and canonises an abstraction.

[1] *Ibid,* pp. 88-100.

The States are sovereign persons in international law, and therefore everything which in any way impairs that sovereignty must be uncompromisingly opposed. The psychological consequences of this have been disastrous. The peoples of member States have regarded the League as something remote, alien, and at times actually hostile to their national interests, and statesmen assembling at the League have preserved a dangerous freedom. They have been accountable only to their own colleagues, from whom they have received instructions. This, in itself, has been fatal to any true growth of League authority, and the attitude of the signatories of the League Covenant indicates that it was intended. More than any other factor, this one has hindered the formation of any true international opinion upon the great issues of the day. Even in the early days of the League's existence, Lord Cecil was conscious of this defect, and suggested that, in addition to the Council and the Assembly, there should be a third body of representatives popularly elected, but his proposal failed to secure any measure of support from the Governments of the day, and it therefore lapsed. If the League is to survive as anything more than a source of international embarrassment, it must be revived. Opposition to it is based upon the theory that the internal and external affairs of a state are separate branches of state activity, that there is no such thing as an international community, and above all, upon the theory of state irresponsibility; it is a strange thing that the representatives of what were then liberal States should have accepted for the nascent League an assumption which is one of the foundations of modern totalitarianism. It is a striking fact that upon both these points the proposals for a League of Nations framed by German representatives were sounder in principle, but they failed to secure extended consideration from the Allied delegates, and one can only profoundly regret that such an opportunity for international conciliation was thrown away. Since, how-

ever, the German proposals form a connected whole, this will be discussed after the present survey of the League Covenant has been completed.

Still a further concession was made to State sovereignty in the early Articles of the Covenant by the requirement of unanimity in decisions of the Assembly, except in certain specified cases. On this the official commentary says:

> "At the present stage of national feeling sovereign States will not consent to be bound by legislation voted by a majority, even an overwhelming majority, of their fellows. But if their sovereignty is respected in theory, it is unlikely that they will permanently withstand a strong consensus of opinion, *except in matters which they consider vital.*"

The last qualification is unfortunate. Even prior to 1914, many of the leading states of the world had signed arbitration treaties, reserving only questions of national honour and vital national interests, and the Commentary therefore suggested that the Covenant was little, if any, advance on this system, and that when a powerful State considered that a vital interest was involved, the Assembly could take no concerted action, and the recalcitrant State would therefore preserve its freedom of action. In addition to the Assembly, there is, of course, the Council, which could make recommendations to the disputing parties, but it is hard to see in what particular the official Commentary's view of the Council differed in substance (as distinct from procedure) from a pre-War Congress. Moreover, even in the Council, unanimity is normally required.

The issue is by no means simple, for it would have been productive of the most serious consequences had it been possible for a majority of the smaller Powers to commit the greater ones; but it should not have been impossible to devise some method of representation in the Assembly

to meet this difficulty. At all events, there is no evidence at all that the problem was even in fact tackled from this point of view.

Article VIII contains the well known provisions for disarmament together with a declaration that "the members of the League agree that the manufacture by private enterprise of munitions and implements of war is open to grave objections." The history of this article (which will be considered more fully in a later chapter) supplies the key to the true attitude of members towards the obligations they had undertaken. If members intended the Covenant to be a real guarantee against aggression then disarmament beyond what was required to discharge obligations under it, and possibly to repel the attack of a non-Member, followed automatically. The attitude of members at successive sessions of the Disarmament Conference made it clear, however, that they did not regard the Covenant in this light, and it therefore followed that no agreement on disarmament was possible. Finally, the condemnation of the private arms traffic was regarded as an interference with the domestic affairs of sovereign States, and the later part of the paragraph in which provision was made for the elaboration of machinery to suppress it, was allowed to become a dead-letter. The attitude of the members upon the crucial question of disarmament having been so clearly demonstrated, it was only to be expected that Article X guaranteeing the territorial integrity of members, would prove valueless.

Under Article XIV of the Covenant provision was made for the establishment of the Permanent Court of International Justice with competence "to hear and determine any dispute of an international character to which the parties thereto submit it." The Statute of the Permanent Court, when drawn, affirmed the inviolability of State sovereignty categorically. "Only States," declares Article XXXIV of the Statute, "or

Members of the League of Nations can be parties in cases before the Court." Accordingly, in the dispute between the Persian Government and the Anglo-Persian Oil Co. in November-December, 1932, it was necessary for the British Government to adopt the case of the Company before the issue could be determined by the Permanent Court. This case alone is sufficient to illustrate the artificiality of a system which denies legal personality to an international corporation. The system was only made workable through the further fiction of adoption. It is not difficult to imagine occasions in which the adoption of a case by a State on behalf of a group of persons in order to bring it before the Permanent Court would inflame, rather than soothe, national animosities. It has been suggested elsewhere that it is time that International Law abandoned the fiction that it is a law made for States, and not for individuals. Its retention is merely one more concession to State irresponsibility.

Article XIX of the Covenant provided that the Assembly should have power to advise the reconsideration of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world. This article has proved such a potential source of embarrassment to members that it has been allowed to become a dead letter. It plainly implied two things: (1) a general supervisory jurisdiction in the League in the general interest, and (2) a possible limitation upon State freedom of action. For both reasons, it was generally disliked.[1]

Finally, it should be noticed that the humanitarian activities of the League set out in Articles XXIII and

[1] During the Czechoslovakian crisis in September, 1938, *The Times*, in a leading article, reproached "the League" for allowing Article XIX to become a dead letter. The muddled mental processes behind such a statement are interesting. The members of the League (and especially the Great Powers) prevented any League action under Article XIX. Then, when an international explosion was imminent, they reproached the League for not doing what their superior force had prevented it from achieving.

XXIV were organised on a voluntary basis; that is to say, the League could arrange conferences and prepare conventions, and the members could adopt their conclusions or not as they chose. The record of even such an apparently liberal State as Great Britain in the matter of Labour Conventions is not impressive, but the point of general importance is that no one who framed the Covenant thought it possible to secure compulsory League activities on these topics, though they were universally admitted to be matters of international concern, upon which constant activity was desirable, in the general interest of human progress.

The main justifications for the form assumed by the League Covenant were two—it was said that it was the utmost that was possible at the time, and it was hoped that once the League was established the habit of legality, a League attitude of mind would steadily grow. While the first proposition is undoubtedly true, the aspiration has not been achieved; it was unfortunately not perceived in 1919 that if the Covenant was the utmost which could be secured then, it was scarcely to be expected that Powers could be prepared to go further, when the shadow of the great catastrophe which had brought it into existence had passed away.

The League Covenant, therefore, has not proved to be that triumph of law and order over selfish aggression for which many hoped when it was first framed, and, in consequence, the movement towards closer international association has received a setback. Before leaving this question, however, it is necessary to consider briefly the German scheme for a League of Nations, drawn up in the early days of the Republic, for it sets out a scheme which in many ways was a distinct advance upon the one accepted by the Allies.[1] While it may well be that some of the proposals—for example that in Article 43

[1] This is conveniently set out in Sir Frederick Pollock's work on the League of Nations.

for the creation of a League of Nations navy, with the consequent abolition of navies of separate states—were scarcely altruistic, there are others which merited more attention than they actually received. The German proposals are quite clearly based upon a more comprehensive attitude towards international organisation than that of the League Covenant. Thus, Article 1 says: "The League of Nations shall, by means of compulsory arbitration in international disputes without resort to force of arms, lay the foundation of lasting peace between its members upon the moral force of right, and shall serve the spiritual and material progress of humanity by way of international co-operation. *The League shall be permanent and shall constitute a united body for common defence against external aggression.* The members shall guarantee one another's territorial integrity, and shall refrain from interference in each other's domestic affairs."

The difference in conception is thus emphasised at the outset, and it is interesting to notice that the special objects of the League are declared to be:

(*a*) Prevention of international disputes.
(*b*) Disarmament.
(*c*) Assurance of free commercial relations and of general economic equality.
(*d*) Protection of national minorities.
(*e*) Creation of an international labour charter.
(*f*) Regulation of colonial matters.
(*g*) Co-ordination of existing and future international institutions.
(*h*) Creation of a World Parliament.

The last object is of special interest. It was proposed that state representatives should be elected by the Parliaments of the respective States, one representative for every million inhabitants, with a maximum of ten representatives, for the first Parliament, and afterwards the World Parliament should decide its own composition with the

assent of a Congress of States which was designed, through its standing committee, to discharge roughly the same functions as the League Council. The German Draft does not seem to include a consideration of the question whether decisions of the World Parliament should be unanimous or by a majority, and since it is provided that decisions of the Congress of States should be by a two-thirds majority, presumably majority decisions were also intended for the more democratic assembly.

There was also provision for a Permanent International Tribunal, corresponding to the Permanent Court at the Hague, and for an International Board of Mediation, seeking to settle disputes by methods of conciliation or equity rather than by the application of International Law. Further, the creation of International Administrative Boards was envisaged, on the lines of those created under Article XXIII of the Covenant, but in more comprehensive terms. Thus Article 19 of the German Draft reads:

> "The League of Nations shall promote all efforts towards the co-ordination of the common interests of the Nations, and shall work for the extension of existing and the creation of new international institutions. This applies especially to the spheres of law, economics and finance."

The history of Europe since 1918, especially in relation to currency questions, the rehabilitation of Austria under League supervision and similar matters, has fully demonstrated the need for international machinery to deal with economic and financial problems.

The Draft contained, in addition, a general clause protecting the rights of national minorities and an article providing that:

> "For the administration of those colonies which are not self-governing, the League of Nations shall

create an international system in the following spheres:

(*a*) Protection of natives against slavery, alcohol, traffic in arms and munitions, epidemics, forced labour and forcible expropriation.

(*b*) Provision for the health, education, and well-being of the natives and assurance of their freedom of conscience.

(*c*) Ensurement of peace by neutralisation of colonial territories and prohibition of militarisation."

The same Article (57) adds:

"Freedom of economic activity shall be guaranteed to the subjects of all the States of the League in every colony regard being had to the general provisions regarding freedom of traffic."

The conviction that some system such as is here outlined will be a necessary condition of peaceful change has steadily gained ground in recent years, especially in respect of Africa.[1]

The sanctions contemplated for breach of obligations towards the League by a member do not differ materially from those which appear in the Covenant.

The German Draft has been an unduly neglected document, and it was a most serious setback to the cause of international organisation that the temper of the times prevented its serious consideration by the framers of the League Covenant. It may be regarded, from one point of view, as a skilful test of the good faith of the original signatories of the League Covenant, for it defined rather more clearly than the Covenant had done, certain key conditions of international association. In other respects —for example in its recognition of the necessity for inter-

[1] See *e.g.*, F. S. Dunn, *Peaceful Change; Peace and the Colonial Problem* (National Peace Council, London, 1935), and *The Colonial Problem,* Royal Institute of International Affairs, 1937.

national economic machinery, of a general minorities clause, and of the necessity for colonial problems to be considered from the international, as well as from the national point of view, it was a more accurate prediction of the problems which would confront the nascent League than the Covenant itself. Finally, inasmuch as it was the product of German thought, it would have secured the full co-operation of Germany in the new organisation at the earliest stage. The mood of the victorious Powers did not permit such co-operation, however, with the result that Germany never accepted the League Covenant as an impartial scheme of organisation, so that her co-operation with the League was for a limited period only, and even then with important reservations.

CHAPTER V

Analysis of Conflicting National Attitudes in League Disputes

(1) The Polish Seizure of Vilna

The illegal seizure of Vilna by Poland in the early days of the League's existence now appears such an ancient story, that most people, except the Lithuanians, have forgotten it. Yet it supplies a most instructive pointer to the manner in which one of the largest states created by the war regarded the instrument which was designed to secure the peaceful settlement of international disputes, an attitude which has since been further illustrated by Poland's imitation of German tactics during the partition of Czechoslovakia.

The Vilna dispute was a legacy of the Russian Revolution and of the reconstitution of the Polish State. No eastern frontier for Poland had been fixed by the Allies, and Russia and Poland were at war. In April, 1919, Poland captured Vilna from the Soviet, who retook it in July, 1920, whereupon Russia ceded the town to Lithuania. In August, 1920, the Russians retreated, leaving the Lithuanians face to face with the Poles. On September 5th, Poland appealed to the League, declaring that Lithuania had committed an act of aggression against Poland in supporting Russia, and added that she would be compelled to consider a state of war as existing between herself and Lithuania, while Lithuania forthwith evacuated Polish territory and ceased to co-operate with Russia. The appeal was considered when the League Council met on September 16th. On September 20th, the Council proposed that there should be an armistice between

Lithuania and Poland, and a withdrawal of Lithuanian troops, but not so far as to evacuate Vilna, and Poland was required to respect territory in Lithuanian occupation, so long as the war between Russia and Poland continued. A League Military Commission was to supervise the execution of this arrangement, but the commission did not get to work until October 4th. Meanwhile, hostilities between Lithuania and Poland continued, and Lithuania was so hard pressed that on September 27th she appealed to the League Council under Articles XI and XII, since it was obvious that Poland was seeking to retake Vilna before the League Commission set to work. Thus, at the outset, the effectiveness of League action was greatly reduced by the delay, and the reluctance of the League to intervene actively was further illustrated by the Council's rejection of the Lithuanian appeal for consideration of her case, on the ground that the Council had dealt fully with the matter.

Conwell-Evans,[1] in criticising the decision, observes that in retrospect it appears mistaken particularly as neither the Committee of Three nor the Military Commission were as yet in touch with the situation, and that an extraordinary Session of the Council, summoned to meet in order to insist on respect being given to the terms of the Resolution of September 20th, might have afforded the Commission the authoritative backing which it sadly needed later.

The reason for the rejection of Lithuania's appeal was not far to seek, however. France was entirely in sympathy with Poland's activities, and in the eyes of Great Britain and France, at this time all-powerful in the League Council, Lithuania had merited her misfortunes by her association with Soviet Russia.

On October 7th, the Commission settled the line of demarcation between Polish and Lithuanian troops, leaving Vilna some miles on the Lithuanian side. The line was

[1] *The League Council in Action*, p. 93.

to become operative on October 10th, but on the 9th a Polish force took Vilna, and although the Polish Government disclaimed responsibility, the Poles remained in occupation, notwithstanding the fact that this was a clear breach of their agreement to accept League intervention, and to suspend hostilities. It involved, moreover, a flat defiance of the decisions of the Military Commission. The reason for this is again clear. France received the news of the fall of Vilna with the greatest enthusiasm. Moreover, the League had appointed a Committee of Three to exercise control over the Military Commission, and this comprised the French Foreign Minister, and the Spanish and Japanese Ambassadors in Paris, and the secretary of this Committee was also a Frenchman. Further, the head of the Military Commission was again a Frenchman, who communicated with the French Foreign Minister through the French representative in Warsaw in the first place, and through the French War Office in the second! It is hardly surprising that in these circumstances, the Military Commission acquiesced in this repudiation of its authority, and the Committee of Three made no effort to exercise control over Poland, until nine days after the occupation of Vilna, and even then, it rested content with the Polish Government's repudiation of responsibility. At this time, moreover, Great Britain and France were the undisputed masters of Western Europe. Surely a special session of the League Council, at least, might have been expected. This strange lapse is explained by the fact that the French secretary of the Council of Three had stated to the Secretary-General of the League, that in the opinion of the French Foreign Office, no further action was desirable.[1]

On October 11th, Lithuania appealed again to the League, asking for the application of Article XVI, to compel the Polish Government to submit to the League's arbitration. Nevertheless, no meeting of the Council was

[1] Conwell-Evans, *op. cit.*, p. 97.

held until the Council reassembled at its normal time on October 20th, and even then discussion of this most pressing matter was postponed for another six days. Immediately economic sanctions were dismissed, since no one in the League Council wished to fetter Poland's possible activities against Russia,[1] and it was clear that Poland was not going to evacuate Vilna. Indeed, Poland now coolly suggested that she being in possession of Vilna and having beaten Russia, the League should wash its hands of the entire dispute. To this suggestion the Council declined to agree, but it was unable to suggest any effective line of action. Instead, it proceeded to discuss the fate of Vilna with the Poles still in possession. In these circumstances, it is not surprising that the discussions had a slightly academic flavour and in the long run amounted to nothing, although they dragged on through several successive sessions of the Council, and resulted eventually, after infinite labour, in the production of a scheme, which earned the distinction of being rejected by both parties to the dispute. The long and unhappy story of the dispute was at length concluded by the intervention of the Conference of Ambassadors in March 1923, awarding Vilna to Poland. It is hard to see in these proceedings anything more than a record of duplicity. Writing at a time (1929) when the future of the League organisation seemed reasonably good, Mr. Conwell-Evans says:[2]

> "The Polish-Lithuanian dispute . . . shows that the Council cannot be effective if the representatives of the Great Powers are not genuinely supported by their respective governments, if one policy is pursued at the League, and another policy is pursued at the Foreign Offices of the Great Powers. The Council, not being a *deus ex machina* able to superimpose its

[1] Though peace had been signed between Poland and Russia on October 12th, Poland still seemed to be in the shadow of the Soviet menace.

[2] p. 119.

> will on the governments, depends for its success, when it is a question of restoring peace, on the sincere co-operation of the great European Powers. That must be obvious."

That is, indeed, the crux of the matter, and the analysis of critical League disputes will show that in them genuine support of the League by the Great Powers never existed, and their responsibility for the breakdown of the League's machinery is a very heavy one, which will earn full condemnation from the historian of the future. The Lithuanian-Polish dispute is obviously a key-case. The League had satisfactorily settled one or two minor disputes, and this was the first of real importance which had been placed before it, and which should have established its reputation for disinterestedness. Instead, it was notorious that the Power which had most to do with the League's activities supported the aggressor. The dispute clearly showed that a strong Power could profit by determined action, in face of the League's clearly expressed wishes to the contrary. Only a very short time elapsed before another power substantially improved upon this lesson.

(2) The Corfu Incident

The March on Rome occurred in 1922, and with the Fascist regime still by no means universally accepted, it became necessary to increase its prestige by some vivid stroke of foreign policy, the requisites of which would be that it should be swift, spectacular, and involving the minimum of risk. It would be an additional advantage if it could also afford an opportunity of testing the solidarity of Great Britain and France. By the middle of 1923, conditions seemed to be entirely favourable for an experiment in international opportunism. The Vilna dispute had at length resulted in the formal recognition of Poland's claim by the Allies. Evidently, therefore, the League was not intended to be an irresistibly effective

instrument of international justice, and great rewards might still await sudden moves by an adventurer with strong nerves. Moreover, relations between France and Great Britain were far from good, since France, in disregard of British advice, had insisted on occupying the Ruhr for a technical default upon reparations, which Great Britain did not regard as a default at all, and at a time when a sentimental regard for the vanquished was taking possession of British public opinion. This coolness in Anglo-French relations supplies the real clue to the Corfu episode, which furnished the first example of the surrender to blackmail by Great Britain and France, of which the latest and bitterest is the destruction of Czechoslovakia.

Mr. Conwell-Evans commented on the dispute[1] as offering a very dangerous precedent for the following reason :

> "The method deemed by the members of the Council best calculated to keep the peace in those circumstances, and eventually to secure the evacuation of the troops, was for the Council as a body to refrain from acting under Article XI and from considering any of the measures permissible under it, even that of attempting by a mediatory appeal to secure the withdrawal of troops; in short, the Council as a body was to refrain from making, either in blame or in justification, any direct reference whatsoever to the hostile act of one of its members. Truly a paradoxical situation, which, if frequently repeated, must deprive the Council of its *raison d'être*."

The observations were prophetic. The experiment has been frequently repeated. Manchuria, Abyssinia, Spain, North China, Austria and now Czechoslovakia and Albania are all corpses strewn along the League's way of Humiliation; and the Council has now been deprived of its *raison d'être*.

[1] p. 73.

At the end of August, 1923, the Italian members of a boundary commission appointed by the Ambassadors' Conference to delimit the Albanian frontier were ambushed and killed in Greek territory. The Italian Government held the Greek Government responsible, and presented a number of severe demands, requiring a reply within twenty-four hours. The Greek Government replied within the specified time, declaring that it was not guilty of an offence against Italy, but nevertheless accepting four of the demands, and rejecting three as incompatible with Greek sovereignty. The Note ended with an undertaking to accept all the decisions of the League on the dispute. The note was delivered on August 30th, but on the following day Italy, brushing aside Greece's invitation to submit the dispute to the League, bombarded and occupied Corfu. The same day Greece appealed to the League, without mentioning the bombardment, invoking the League's jurisdiction under Articles XII and XV. It may be observed that although Italy had plainly resorted to war in defiance of her obligations,[1] no one, not even the Greek representative himself—assumed that the provisions of the Article XVI would be brought into operation. That in itself is a most significant indication of the general attitude towards the League, following its failure in the Polish dispute. As Mr. Conwell-Evans points out, invocation of Article XI would have afforded the League an *easier* way out, and by failing to rely on it, Greece lost a valuable opportunity, but even this is an argument based on expediency, and not on right. However, even if Article XI had been invoked, there is no reason to suppose that the consequences would have been very different, for Mussolini was busily engaged in explaining to every diplomatic representative in Rome that if the matter was left in the hands of the Conference of Ambassadors, he would evacuate Corfu in due course, while if the League

[1] Lord Cecil referred at the Council to Italy's "act of war." p. 77.

intervened, he would retain the island. To adopt such a course was to give a sop to the Great Powers, and to undermine the authority of the League; Great Britain and France rushed into the trap. No action was taken by the League Council in respect of the bombardment of Corfu, but it proceeded to discuss the question of Greek reparations to Italy, although the Ambassadors' Conference was already doing the same thing. When it had drawn up proposals for a settlement, and forwarded them to the Ambassadors' Conference, it was found that they contained no reference at all to the evacuation of Corfu, so that the League had deliberately abstained from any censure of Italy's action. Worse was to follow, however. Greece had been compelled by the League to deposit 50 million lire, on the understanding that the size of the indemnity should be decided by the Permanent Court. By a curious coincidence (!) the Ambassadors' Council directed Greece to pay over exactly that amount to Italy (thereby ignoring the reference to the Permanent Court) and the next day Italy evacuated Corfu. Thus, two distinct surrenders to blackmail were involved in the settlement of the Corfu episode, and even the appearance of justice was ignored. The League could scarcely have made a worse start, and the impression is gained that at this stage, the Western Powers were at one in agreeing to circumscribe the authority of an institution in which they no longer believed. Moreover, the smaller states were already showing distinct signs of anxiety, while public opinion was steadily being habituated to the spectacle of a League shorn of all real authority.

"Had Italy violated the Covenant in invading Greek soil?" asked a student of the League. "To the common man the answer was perfectly clear. The whole world was outraged by Italy's action and looked on amazed and perturbed while the Council sat silent. In defence of the Council it has been argued that definite action on its part would have exacerbated the situation; that no

one knew what an excited Italy would do; and that in the end Italy did evacuate the island. Such a defence should not be lightly used, for it amounts to saying that, when war threatens, the Council's intervention is considered to do more harm than good. Besides, to have to sit silent under a threat expressed in a resort to arms on the part of one of the members of the Council is not a situation to be viewed with complacency in an estimate of the Council's capacity to maintain peace."[1]

Later, in the Manchurian and Abyssinian disputes, the Conservative Press of Great Britain used precisely the argument that the intervention of the League would do more harm than good as an excuse for reducing collective security to a nullity.

(3) The Japanese Conquest of Manchuria

To attempt to analyse the root causes which led to the deliberate and well-planned invasion of Manchuria by Japan in 1931 would be out of place here, but some survey of the principal factors influencing this act of aggression must be attempted. Since Japan, in the second half of the nineteenth century freed herself of Western tutelage, and reorganised herself as a modern State, her attitude to China has never been in doubt, and it has never wavered. Her primary object has been to destroy Russian influence in China, more particularly in Korea and Manchuria; and following that, to obtain a dominating position, politically and economically, in China, so that ultimately she could use it to secure her own commercial expansion, and to exclude other foreign competitors from China. The former of these objects was secured by well-defined stages, of which the first was the Russo-Japanese War, which resulted in Japan obtaining a firm foothold in South Manchuria and led in 1911 to the annexation of Korea. In the second stage, she was

[1] Conwell-Evans, *op. cit.*, p. 80.

greatly assisted by the Chinese Revolution, which resulted in the disintegration of the Chinese Central Government, and the domination of China between 1917 and 1928 by rival war-lords. One of these, Chang Tso-lin, established his authority in Manchuria with Japanese aid, and as a result, the Japanese grip on Manchuria tightened perceptibly during this period. A second factor which greatly assisted during this period was the Russian Revolution, as a result of which Russian ambitions in the Far East received a temporary set-back. Even when the Allied expedition to Siberia in 1919-1920 had failed, the Soviet still felt that its position in the Far East was weak, and as a result it renounced some of its special rights as a treaty-power in China, and sold the Chinese Eastern Railway for a fraction of its value to Japan. The result was that in 1928, the predominance of Japanese influence in Manchuria was undisputed, and Japanese control over the essential raw materials which that province could supply seemed undisputed. In 1928, however, Marshal Chang Tso-lin was killed in retreating to Manchuria after an unsuccessful defence of Peking against the advance of Nationalist forces into North China, and when his son, Chang Hsieh-liang, the "Young Marshal," succeeded him in control of Manchuria, it soon became apparent that he was prepared to come to terms with the Chinese Nationalist movement. Between 1928 and 1931 there was a steady spread of Nationalist propaganda into Manchuria, until eventually, Japan became alarmed, fearing that if the Chinese Government recovered control of the northern province, her own interest would be jeopardised. There was some substance in this fear, for the Chinese began to construct rival railways to the Japanese-controlled system, and there was evidence that this was the first of a succession of commercial enterprises, having the same object in view. Meanwhile, the doubling of the trans-Siberian track, coupled with formidable military preparations in the Maritime Province of Siberia, made it probable

that in the future Japan would have most formidable Soviet forces to deal with in the Far East at some future date.

As far as Japan's second fundamental object was concerned, the record was by no means one of unbroken progress. After the Sino-Japanese War of 1894, Japan was compelled to relinquish some of the spoils at the bidding of European powers. Again in 1905 she obtained by the Treaty of Portsmouth less than she had expected, whilst the general acceptance of Senator Hay's "Open Door Principle" by all the Powers with interests in China seemed to put an end to all possibility of unilateral enterprise by her in China proper. Japan's opportunity however, came during the War of 1914-1918. Being nominally an Allied Power, and being also at peace with China, in 1915 she presented to China the notorious Twenty-one Demands, which were to be accepted by China without prior negotiation. Although the United States protested, she was unable to do more, and none of the European Powers was able to do much. The effect of the Demands was to secure for Japan that dominance in Chinese affairs for which she had been striving, and although she received at the Peace Conference a check through the refusal of the Conference to grant her Shantung outright, nevertheless, she was permitted to take over many of the rights which Germany had formerly secured in the peninsula. In 1922, however, Japan was once more compelled to disgorge some of her gains at the Washington Conference, at the bidding of Western Powers. The most oppressive of the Twenty-one Demands were abrogated, the Anglo-Japanese alliance was terminated, and the adoption of the 5 : 5 : 3 ratio for capital ships set a limit to her naval expansion. Moreover, the Nine Power Treaty in the plainest terms reaffirmed the territorial integrity of China, and the principle of the "Open Door." Once more, Japan felt that her position was extremely isolated, and it was obvious that her aspirations

in China proper had received a serious rebuff. Her aggression in Manchuria was a carefully timed step, designed to test the solidarity and the strength of her possible opponents in her attempt to dominate China, and it succeeded even beyond her expectations. Japan gambled upon the economic depression, the worst effects of which were then being experienced in the West, and her gamble came off.

The incidents which offered a pretext for Japanese aggression were three: (1) A riot between Chinese and Korean farmers in Manchuria at Wanpaoshan on July 1st, 1931; (2) the arrest and murder by Chinese irregular soldiers of Captain Nakamura and three assistants whilst travelling in the interior of Manchuria under the orders of the Japanese army; and (3) an explosion on the South Manchurian Railway on September 18th. In all three cases, China offered to investigate the incidents and if found responsible, to offer satisfaction, but the Japanese preferred to resort to force. The Lytton Commission says of this action:

> "The Japanese . . . had a carefully prepared plan to meet the case of possible hostilities between themselves and the Chinese. On the night of September 18th-19th this plan was put in operation with swiftness and precision. The Chinese had no plan of attacking the Japanese troops, or endangering the lives or property of Japanese nationals at this particular time or place. They made no concerted or authorised attack on the Japanese forces, and were surprised by Japanese attack and subsequent operations. An explosion undoubtedly occurred on or near the railroad between 10 and 10.30 p.m. on September 18th, but the damage, if any, to the railroad did not in fact prevent the punctual arrival of the southbound train from Changchun, and was not in itself sufficient to justify military action. The military operations of the Japanese troops during the night . . . cannot be regarded as measures of legitimate self-defence."

The resulting operations had all the appearance of a well-arranged plan, which proceeded with almost mathematical regularity, leading to the establishment of the puppet-state of Manchukuo, and in 1933, in the annexation to that state of Jehol, and the demilitarisation of a large area of Northern China.

The handling of this problem of first magnitude by the League revealed a confusion of thought on the part of the Powers principally concerned, which necessarily doomed its efforts to failure. China first appealed to the League on September 21st, 1931, under Article XI of the Covenant, by which any war or threat of war is declared to be a matter of concern for the whole League, so that the League may take "any action that may be deemed wise and effective" to safeguard the peace of nations. Procedure under this article is conciliatory, and no action could be taken under it without Japan's consent; but the most striking example of such a shifting of emphasis in the interpretation of the Covenant is the extent to which Article XI has replaced Article XVI as the shield of international security—or, one is tempted to add, of international insecurity, for the futility of procedure under Article XI in cases where the offender is a powerful State determined to disregard everything but the application of force, was irrefutably demonstrated by the progress of the Manchurian dispute at Geneva.

Following China's first appeal, the League sought to secure a cessation of fighting and the return of Japanese troops to the railway zone, and it accordingly addressed a request to both Governments, to refrain from any act which might aggravate the situation. China signified her willingness to comply, and the Japanese reply stated that she had no territorial designs in China, that withdrawal of troops to the railway zone had already begun and would continue as the situation improved. It appeared, however, that even at this date, Japan was determined to secure a direct settlement with China, and she rejected the Chinese

proposal that a League Commission should settle the dispute. A resolution of the League Council noted the replies of the two parties, whereupon the Council adjourned until October 14th, by which time it was hoped that evacuation would be complete. The Japanese reply to this was to extend military operations and to put forward the new contention that a general settlement of all outstanding questions between the two contesting parties must precede any withdrawal. On October 9th, in conformity with this second objective, Japan transmitted to China five "basic principles," designed to cover the negotiations.

In view of the changing Japanese attitude (or the gradual disclosure of Japanese aims when it became apparent that no intervention was contemplated, at any rate immediately), the Council reassembled on October 12th, at China's request, and on the 22nd, drafted and adopted (with the exception of Japan) a resolution calling on Japan to complete the withdrawal of her troops by November 16th. By this time, the United States had decided to co-operate as closely as possible with the League Council, and on October 20th sent notes to China and Japan, calling their attention to the provisions of the Kellogg Pact. Similar notes had already been sent by Great Britain, France, Germany, the Irish Free State, Italy, Norway and Spain.

Since the resolution of October 22nd could not become operative without the consent of Japan, the Council adjourned until November 16th the date which the resolution had adopted as the limit for Japanese withdrawal. In the interval Japan rejected a Chinese offer to settle all disputes by pacific means, and indicated at the same time that she had no intention of withdrawing her troops. It was with this situation before it that the League Council reassembled, and decided to send the Lytton Commission to Manchuria to investigate both the circumstances of the resort to force and the whole question of Sino-Japanese relations. In taking this step, the Council had adopted

a Japanese suggestion, although it had been qualified by the reservation that the Commission should not comment on troop movements, and should take no part in settling the dispute.

The Commission sailed for the Far East on January 14th, 1932. Before it arrived, however, the Manchurian affair had passed into a more serious phase. Having established control over the whole of South Manchuria, Japan sponsored an independence movement, which proclaimed the autonomy of Manchuria. Meanwhile fighting had spread to Shanghai, and when the Council met on January 25th, China appealed yet again to the League, this time invoking Article X, which guarantees the territorial integrity of members, and also Article XV, which provides for the submission of disputes to the Council and declares that if a member refuses to submit to the Council's jurisdiction and the procedure described in the Article, Article XVI, with the provision of sanctions, possible military intervention, and expulsion from the League, shall come into force. On February 12th, China also asked that, under Article XV, the dispute should be referred to the Assembly. Four days later, the Council sent a note to Japan, reminding her of Article X, and indicating that there could be no recognition by members of any situation arising from the infringement of the territorial integrity of a member. This was in line with the note sent by the United States to the parties on January 7th, stating that the United States would not admit the legality of any situation *de facto*, nor recognise any treaty or agreement between the two Powers which might impair the treaty rights of the U.S.A. in China (including, of course, the Washington agreements), or which might be brought about contrary to the Kellogg Pact. In view of the attitude taken up by the League and by the United States, the attitude of Great Britain is curious in the extreme. A British communiqué of January 9th declared that in view of Japanese assurances

of adherence to the Open Door principle in Manchuria, Great Britain had not considered it necessary to address any formal note to Japan on the lines of that of the United States. It will be observed that nothing at all was said or implied concerning the violation of Article X of the Covenant, which even at that date Great Britain appeared to treat somewhat lightly, still less is there any protest against the violation of the Kellogg Pact, which the British Government appeared to regard as little more than a pious aspiration; and if the Conservative Press of the day is searched, it will be found that influential spokesmen for what may be termed the "official policy" were going to very considerable lengths to justify Japanese activities, presumably (and in some cases avowedly) in the hope of tangible benefit to follow. Even this unfortunate attempt to barter principles of international intercourse for tangible cash benefits has been frustrated, for Japan rapidly established a commercial monopoly in Manchuria, and has virtually destroyed foreign trade there. The Japanese, however, were not slow to perceive the cleavage in policy between Great Britain and the United States, and for what followed the British Government must be held in no small degree responsible. The unfortunate failure to achieve a common policy with the United States must be attributed, from the standpoint of responsibility, to the Foreign Secretary, Sir John Simon, and presumably it was consciousness of this which resulted in his subsequent removal from the Foreign Office. Yet Sir John Simon still remained a leading member of the National Government, and has even been named as a possible successor to Mr. Chamberlain as Premier. This, coupled with the similar action of Sir Samuel Hoare during the Abyssinian affair, his resignation and his restoration shortly afterwards, indicates that these ministers acted with the full approval of the National Government and its supporters, even though their action in both cases was not only subversive to the fundamental principles underlying the League

Covenant (limited in scope though it is), but has also been, as the event has shown, directly in conflict with the distinct interests of this country.

The remaining activities of the League in the dispute can be quickly summarised. The League Assembly on March 11th adopted the resolution of the Council of February 16th, relating to non-recognition. Part III of the same resolution provided for the establishment of a Committee of Nineteen to investigate the situation in Shanghai and Manchuria, with the object of presenting recommendations to the Assembly. The Lytton Report was published on October 1st, but by that time Japan had already recognised Manchukuo. The Report was discussed by the Council between November 21st and 28th, and was then referred to the Assembly, which in turn referred it to the Committee of Nineteen, with instructions to consider it and draft proposals for a settlement. The Report condemned the action of Japan, and proposed that Manchuria should become autonomous, under Chinese sovereignty, with a recognition of Japanese rights, and the conclusion of general, commercial and arbitration treaties between China and Japan. On December 15th, the Committee of Nineteen suggested that a new Committee should be constituted from its members with the object of conducting negotiations, in association with the United States and Russia, with the two parties for a settlement of the dispute on the basis of the Lytton Report. Japan's reply was to begin fresh military operations in China proper, and to object to participation by Russia or the United States in the proceedings. There were also other objections which made it clear that Japan was not prepared to co-operate, whereupon in February, 1933, the Assembly unanimously (except for Japan) drafted a report and recommended action closely following the lines of the Lytton Report, reaffirming the determination of members not to recognise the consequences of Japanese aggression in Manchuria. The result of this was the with-

drawal of the Japanese delegation from the Assembly, followed by the formal withdrawal of Japan from the League on March 27th. This resignation accordingly took effect in March, 1935, and it should be noticed that on that date the League had become so ineffective that the question of the mandates which Japan holds from the League has never been seriously raised. The United States, it must be added, in a note of February 24th, endorsed the principles of the League resolutions just formulated, and continued to co-operate with the League upon an Advisory Committee appointed to deal with the consequences arising from the adoption of the resolutions.

A report prepared by the Royal Institute of International Affairs comments:[1]

> "An analysis of the reasons for the failure on the part either of the League as a whole, or of the Great Powers acting independently, to prevent Japan's conquest and separation of the Manchurian provinces, would be out of place here. It must suffice to recall that the dispute broke out at a time when Europe and the U.S.A. were in the throes of the world economic crisis of 1931, and that it reached its final stage at a time when National Socialism was rising to power in Germany, that two of the Powers most vitally interested in the Far East, namely the U.S.A. and Soviet Russia, were not members of the League, and that since public opinion in the former was unprepared for direct action and the latter incapable at that time in a military sense of embarking on drastic measures, the responsibility for any military or naval operations that might have been undertaken would have fallen almost entirely on Great Britain, who was herself ill-prepared to assume it."

These observations, written in 1938 as an introduction to a survey of the later Japanese attack on China are somewhat misleading. Reference to the proceedings of the

[1] *China and Japan* (Information Department Papers, No. 21), pp. 51-52.

League will show that Germany co-operated with the other Powers in what was done, and the only possible relevance which the rise of National Socialism to power could have at that date would be to render Germany helpless in the unlikely event of her seeking to profit from League preoccupations in the Far East. The fact that the United States was not a member of the League is in this instant entirely irrelevant, for the record of the proceedings showed that the United States went as far as any Power, and further than this country, in opposing Japanese aggression—a circumstance which rendered the concluding sentences of this summary at least arguable. Moreover, the assumption that military measures would be necessary ignores the possibility of imposing sanctions, to which Japan was far more vulnerable then than now, and finally it entirely omits to mention the paralytic effect upon League activity of the rebuff which Sir John Simon administered to the United States, thereby supplying the League with a plain pointer to Great Britain's curiously dual attitude. After this, the only thing that the League could have done, would have been to have expel Japan, rather than to have permitted her to withdraw.

(4) The Conquest of Abyssinia by Italy.

Inasmuch as Marshal Badoglio has pointed out in his volume upon the Abyssinian war that the whole enterprise was deliberately planned by Mussolini and his advisers several years before the Walwal incident, it is unnecessary to consider in detail the circumstances out of which this recent adventure in imperialism arose. All that will be attempted is a brief survey of the conduct of the dispute by the League, with some reference to the attitude of the two principal League Powers towards Italy while the dispute was in progress. It must be pointed out, however, that the setting for League activity during the course of this struggle was different from what it had been

in the Manchurian affair. The Nazi Party had arisen to power in Germany, and was engaged in repudiating the restrictions imposed upon Germany by the Treaty of Versailles as quickly as circumstances permitted. Moreover, Germany had withdrawn from the League, so that it was impossible to predict what her attitude towards the question would be. As far as the United States was concerned, after her rebuff over the Manchurian affair, there would be no question of close co-operation on her part against an aggressor, although the prosecution of any expansionist policy by force would incur American censure. On the other hand, Russia had entered the League, and took a full share in its deliberations, while Japan, having withdrawn naturally remained detached, seeking only to further her own interests. This was done with remarkable clumsiness, for Japanese interest in Abyssinia at first aroused fierce resentment in Italy. Later, Italo-Japanese relations improved to the accompaniment of much declamation in Italy upon the political solidarity of the two nations. At this date, there was no formal alliance of the three aggressive powers although their identity of aims was already becoming apparent.

On the day following the Walwal incident Abyssinia asked that the dispute should be submitted to arbitration. When Italy refused this, Abyssinia drew the League's attention to the gravity of the situation, and eventually lodged a formal appeal on January 5th, 1935, under Article XI, as China had previously (and unsuccessfully) done. No further step was taken, however, since strong pressure had been placed upon Abyssinia to suspend the appeal pending negotiations between the two states. As a result, consideration of the Abyssinian appeal was postponed until the Council meeting in May. This initial activity appears inexplicable, but an explanation is to be found in the fact that the French Foreign Minister, Laval, was in Rome from January 4th until January 7th, and was trapped into the equivocal position which Madame

Tabouis has described so graphically.[1] Thus, at the outset, effective action by the League was very seriously prejudiced by the maladroit actions of the representative of one of the most influential Powers, which was also seriously concerned with the consequences of the dispute. In January, there was another clash near Walwal, and in February Italy began to mobilise her army of conquest and to concentrate war material in her African colonies, and she continued to reject all Abyssinian offers to reach a settlement by conciliation. On March 17th, Abyssinia again appealed to the League, this time under both Article X and Article XV, and again the Council showed extreme reluctance to assume jurisdiction (a circumstance which was less surprising in the light of subsequent events), but on April 12th, the disputants at last agreed to submit the incident to a Commission of Conciliation, operating under the Italo-Abyssinian Treaty of 1928. This being done, the Council again postponed the hearing of Abyssinia's appeal until May.

Italy's acceptance of the Committee of Conciliation was no more than a time-gaining device, for she embarked on a press campaign against Abyssinia (a technique later perfected by Germany as a preliminary to the seizure of Austria, and again during the Czechoslovakian crisis) whilst she continued to pour troops and arms into her colonies. It will therefore be apparent that the League deliberately refrained from taking any action at all during the months of mobilisation of the Italian army in Africa, when any determined action would have turned the entire adventure into a catastrophe for Italian policy. It should have been obvious to the meanest intelligence that it would be incomparably harder to arrest Italian policy when all preparations were complete than during the process of mobilisation, and one is therefore compelled to conclude that the League, and in particular Great Britain and France, had no desire to frustrate Mussolini's ambi-

[1] *Blackmail or War*, pp. 76-80.

tions at this stage (if, indeed, at any stage). In view of the preparations, which were daily reported in the world Press and news-reels, Abyssinia addressed yet another note to the League on May 13th, asking that her territorial integrity and independence should be preserved against unprovoked aggression.

On May 24th, Mussolini delivered a characteristic speech, indicating his determination to prosecute the Abyssinian venture at all costs. On the following day, however, Mr. Eden (the British Under-Secretary for Foreign Affairs, and in June, Minister for League of Nations Affairs) and M. Laval reached at Geneva an agreement with an Italian representative, providing that if the commissioners appointed by the disputants had not reached a settlement by July 25th, the League Council should meet again. By accepting this decision, Italy apparently recognised the League's standing in the dispute, and agreed to its pacific settlement. Nevertheless, frontier incidents continued, as did also the despatch of troops and war material from Italy to Africa. Of that material, it should be pointed out, a great proportion of the oil was British-owned. On June 20th, Abyssinia sent a fresh note to the League, pointing out that aggression upon Abyssinia was imminent and asking for neutral observers, and on July 4th, she appealed to the United States Government to draw the attention of Italy to the obligations under the Kellogg Pact. The American reply gives the measure of her reduced activity in the problem of collective security. "The United States Government expressed in reply its concern for the maintenance of peace, but did not refer to Abyssinia's specific request."[1]

On July 9th, the proceedings of the conciliation commission finally broke down, because, while Abyssinia wanted a settlement of the entire question of her relations with

[1] *Abyssinia and Italy* (3rd Ed.). The Royal Institute of International Affairs (Information Department Paper, No. 16), p. 35.

Italy, Italy declined to discuss them until the question of responsibility for the Walwal incident was settled. However, on July 14th, and again on July 23rd, Italy expressed her willingness to continue negotiations in the Conciliation Commission, but simply upon the basis that responsibility for the Walwal incident must first be decided. Accordingly, Abyssinia appealed for the consideration of her case by the League Council at its session on July 31st. The leading parts at this meeting were played by Mr. Eden and M. Laval, whose energies were devoted primarily to securing the resumption of work by the Conciliation Commission or, failing that, a discussion of the entire question by the Council, together with securing that the parties should not resort to force until the Council had deliberated on the matter. Eventually, on August 3rd, the Council resolved that the Conciliation Commission should resume work, and draft its report by September 1st. This was unanimously adopted. The second resolution was that in any event the Council should meet on September 4th to examine the whole dispute. The Italian representative abstained from voting on this. It was also agreed that as signatories of a treaty of 1906 respecting interests in Abyssinia, representatives of Great Britain, France and Italy should meet at an early date. This meeting occurred on August 16th, but no agreement was reached, since it had become obvious that Italy would consider nothing short of control of large areas of Abyssinia.[1] On the other hand, Sir Samuel Hoare, who had succeeded Sir John Simon as British Foreign Secretary, said in the House of Commons on August 1st, 1935:

> "We are second to no one in our intention to carry out our obligations under the treaties and under the Covenant.
>
> "The effect of a war between Italy and Abyssinia would, in our view, be wholly bad. Whether the war be long or short, whether the victors be Italy or

[1] *Abyssinia and Italy*, p. 38.

> Abyssinia, the effect would be harmful beyond exaggeration to the League and all that the League stands for. The attempt that we have made in the post-War world to substitute peaceful settlement for the arbitrament of the sword would have been frustrated. The small weak countries of the world would see the protection upon which they have been depending gravely endangered. The pacts that have been laboriously concluded for the greater security of Europe would seem little more than scraps of paper. That is why we shall strive to our utmost to keep the League in being."

It would have been better for the security of small nations, as well as of this country, had the British Government kept these words plainly before it in the months and years which followed. Actually, it gave every indication of doing so, for at a meeting of the British Cabinet on August 22nd, it was decided to maintain an embargo on arms to both contestants, and to act in accordance with previous declarations of policy with regard to the Covenant.

On September 4th, the Conciliation Commission produced a unanimous report absolving Italy from responsibility for the Walwal incident, but at the same time absolved the Abyssinian Government of responsibility. In their words, the incident was accidental in character, and the later incidents were dismissed as "very ordinary occurrences." On the same day, at the League Council, Mr. Eden gave a full account of the Paris meeting, and of the rejection by Italy of the proposals made by Great Britain and France, and concluded by an appeal for further negotiation through the League. This was supported by France and rejected by Italy, whose representative then embarked upon a comprehensive indictment of Abyssinia. The result of the meeting was that a Committee of Five, comprising Great Britain, France, Poland, Spain and Turkey was appointed to enquire into the rela-

tions of Italy and Abyssinia with the object of finding a peaceful settlement. On September 9th Abyssinia made fresh proposals, including the offer to cede a substantial portion of Abyssinian territory, as well as commercial advantages, to Italy.

On the same day, at the opening of the League Assembly, Sir Samuel Hoare gave a most impressive exposition of British policy in relation to the League, the most complete that has ever been delivered in the history of that institution. He said:

> "The obligations of the Covenant remain, their burden upon us has been increased manifold. But one thing is certain. If the burden is to be borne, it must be borne collectively. If risks for peace are to be run, they must be run by all. The security of the many cannot be ensured solely by the efforts of a few, however powerful they may be. On behalf of His Majesty's Government in the United Kingdom I can say that they will be second to none in their intention to fulfil, within the measure of their capacity, the obligations which the Covenant lays upon them."

This might be regarded as the charter of the smaller League members, but that was not all. The Foreign Secretary went on to explain that prevention of war was not enough. It was necessary to remove the causes of war. These causes, he said, were economic, rather than political or territorial. It was therefore desirable to guarantee the fair and full distribution of raw materials, and he announced that the British Government was prepared to share in an investigation of the whole problem. That may be regarded as a serious contribution towards the solution of the problem of peaceful change and a step towards satisfying the desires of the unsatisfied nations. Continuing, however, the Foreign Secretary said:

> "In conformity with its precise and explicit obligations the League stands, and my country stands

with it, for the collective maintenance of the Covenant in its entirety, and particularly for steady and collective resistance to all acts of unprovoked aggression. The attitude of the British nation in the last few weeks has clearly demonstrated the fact that this is no variable and unreliable sentiment, but a principle of international conduct to which they and their Government hold with firm, enduring and unrevised persistence.

"There, then, is the British attitude towards the Covenant. I cannot believe that it will be changed so long as the League remains an effective body, and the main bridge between the United Kingdom and the Continent remains intact."

Three months later the same minister agreed to the partition of Abyssinia. Three years later Sir Samuel Hoare and Sir John Simon were leading members of a Cabinet which first acquiesced to the extinction of another member of the League, Austria, and then took the initiative in carving up yet another member, Czechoslovakia.

The immediate effect of Sir Samuel Hoare's declaration was profound. Lesser members rallied to Great Britain's lead, and two days later M. Laval made a speech of similar tenor, though couched in a much lower key. The American Press showed remarkable and uniformly favourable interest. Experts began to work out the machinery of sanctions and to discuss the manner by which the Suez Canal should be closed to Italy. The British Fleet concentrated in the Mediterranean, and Great Britain secured a promise from all Mediterranean members that their ports would be open for the fleet. The whole world waited the collapse of Mussolini's adventure, from which Germany rather ostentatiously disclaimed any interest. At that point the League was about to be born as an effective reality, and the technique of wanton aggression was about to receive its death blow. When parturition at length

ensued, however, the League was still-born, and the midwives who had been responsible for this were—Sir Samuel Hoare and M. Laval!

The explanation of this destruction of collective security is not easy to find. Mussolini invaded Abyssinia in the autumn and made unexpectedly rapid progress. Sanctions came into operation on November 18th, and were reasonably rigidly enforced. Suddenly, however, a note of doubt crept into the utterances of British Statesmen. "Sanctions mean war," said Mr. Baldwin and hinted that Great Britain's unpreparedness might precipitate a major calamity. This is very hard to believe. It is now generally known that British rearmament began some time before its public announcement. In any event, as Sir Samuel Hoare had emphasised in September, Great Britain did not stand alone. There was France and over forty other nations, some of them with considerable forces, even if the might of Russia is overlooked. Moreover, the Italian navy was obviously far inferior to the British, even ignoring potential allies. No intervention from Germany was expected, or even possible. Presumably Mr. Baldwin's oracular pronouncement had not been revealed to him in a vision. Surely some vague inkling of it had been present in the minds of the Cabinet in August. What then, was responsible, first for the notorious Hoare-Laval proposals, with the resignation of both ministers, and then for the failure to impose the oil sanction, and thus paralyse the Italian expedition? It may be admitted at once that Mr. Baldwin was right. Had the oil sanction been imposed, Mussolini in a last desperate throw, would have attacked Great Britain. It may also be admitted that because of M. Laval's unfortunate visit to Rome in January 1935, France had consistently sought to impair the efficacy of British and League action. By December, however, France had fallen into line, and was imposing sanctions. The issue was clear cut and the forces on the side of collective security were overwhelming. Why then

did Great Britain and France hold back? It was not for military reasons, and common sense seemed to indicate that British interests might be seriously prejudiced by the Italian conquest of Abyssinia. Could it have been because Mussolini waved the bogy of a Communist Italy before the startled eyes of the British Cabinet? Worse still, could it have been that the British Cabinet believed Mussolini? What a triumph for dextrous showmanship!

If this essay were a history of the collapse of the League, the events which followed the Abyssinian failure would make a long record of one of the most tragic stories of diplomatic ineptitude in the history of the human race. A large literature has depicted the triumphant onward march of the dictators which has been conducted with mechanical regularity. Upon each occasion "well-informed" apologists have sprung up in the press of Great Britain and France, depicting them as much wronged and much misunderstood benefactors, bent only on security and peace. Each pitiful failure of the principal League Powers to grasp the true meaning of each successive aggression has been recorded in the League's increasing inability to exercise any effective control over the outbreak of organised violence, and the rapid and universal retreat after 1935 of the smaller Powers from the Covenant. Rarely have statesmen seen their work so completely destroyed in their own lifetime, but only in England have the statesmen primarily responsible for that destruction been retained in office. When Austria was destroyed, no reference whatever was made to the League Covenant. It was similarly ignored when Czechoslovakia was dismembered. It was another British Foreign Secretary, Lord Halifax, who invited the League to eat its own words, and repudiate its own acts in the Abyssinian dispute, as a means of facilitating agreement between Great Britain and Italy, which not only failed to secure the removal of a single Italian soldier from Spain until the threat of Germany's domination of Central Europe had been made

manifest to both states, but also failed to secure a promise even of Italy's neutrality in the event of war with Germany during the Czechoslovakian crisis. When failure of political insight is combined with lack of principle, it is not surprising that the practical results are disastrous. During the height of the Czechoslovakian crisis, the British representative, Lord de la Warr, at the meeting of the Assembly of the League on September 16th, 1938, yet found time to suggest the further mutilation of the League Covenant in the following terms:

> "The League is faced with a position never contemplated by its founders, the result of secessions and the increase in vast armaments. The balance has been upset.
>
> "The League has tended to strengthen the sanctions Article at the expense of the provisions devised for the specific settlement of disputes. The Covenant has come to be regarded as punitive and as an instrument for maintaining the *status quo*.
>
> "Its real essence lies in the recognition of the principle of peaceful change and the prohibition of war until all means of pacific settlement have been exhausted.
>
> "This flexible and comprehensive machinery for the settlement of disputes has not received the attention it merits and has been overshadowed by the coercive clauses. Any enhancement of the strength of this machinery will be welcomed by the United Kingdom Government.
>
> "Many States hesitate to accept obligations that may involve them in disputes when their own interests are not at stake. They regard the system of sanctions as suspended. The Government of the United Kingdom consider that an honest avowal of the limitations of the League and the re-examination of the original intentions of its founders might put it on a sounder basis as an instrument of peace.
>
> "There are certain principles on which it is impossible to compromise. But the present difficulties

of the League are not permanent, and there can be no question of a modification of its juridical basis. There is nothing essentially wrong with the Covenant. The United Kingdom Government will be prepared in due course to make clear their attitude towards the coercive clauses.

"The circumstances for international action and the possibility and nature of that action cannot be determined in advance. Each case must be considered on its merits. There can be no automatic obligation to apply economic or military sanctions.

"There is a general obligation to consider whether and how far Article XVI (Application of Sanctions) can be applied, and what common steps could be taken to render aid to the victim of a breach of the Covenant.

"Each State must be the judge of the extent to which it can participate, and will be influenced by the extent to which others are prepared to act.

"Aggression against a member of the League must be a matter of concern to all members and not one on which they are entitled to adopt an attitude of indifference.

"There must be some modification of the unanimity rule so that under Article XI (action in emergency) the League would be able to intervene in any dispute sooner than it can now. It is of the greatest importance that at the earliest possible moment the parties should know where they stand.

"The United Kingdom Government favour effect being given to the recommendations of the Committee of Jurists with regard to the separation of the Covenant from the Peace Treaties.

"There is only a frail barrier between society on the one hand and disruption on the other. The League stands midway between, and it is the firm intention of the United Kingdom Government to preserve it. If it did not exist to-day statesmen would be seeking means of constructing it.

"The world has gone both mad and bestial. The

task before this generation is to recreate a belief in the things which make life worth while."

The Times of September 17th appropriately commented that this statement was received with prolonged applause, but the best comment upon the lines of British policy since 1935 is to be found in the statement of the Norwegian representative of September 16th:

> "On behalf of Norway, Hr. Koht, the Norwegian Foreign Minister, stated that the return to a policy of opposing alliances on the part of the Great Powers had transformed collective security into collective insecurity, and obligations under the Covenant had become dangerous to the smaller states rather than reassuring. In these circumstances Norway was resolved to remain master of her own fate and to decide for herself with regard to any action under Article 16. Consequently there could be no question of the passage of troops across her territory, even to oppose an aggressor, without the special authorisation of the Norwegian Government. With regard to economic sanctions, Norway would be prepared to act in certain circumstances, but must retain the right of decision. Her policy was to keep the country out of war and to preserve complete neutrality as far as it was possible to do so. But Norway was not anxious in any way to see changes in the Covenant, which was not nearly so bad as they were sometimes led to think."

The result of these proceedings in 1938 has been to permit each member of the League to adopt its own interpretation of Article XVI, and it would, therefore, seem that for the present at any rate, the death-blow has at last been given to the ideal of "collective security." Indeed, it is now fashionable in wide sections of the British Press to dismiss it with the contemptuous indifference which one would naturally expect from the controlled

Press of a dictatorship. The views expressed by the British representative at the meeting of the Assembly in September, 1938, may have been justified by the international situation, but to whom might responsibility be attributed for the existence of that situation?

CHAPTER VI

THE FAILURE OF LEAGUE PRINCIPLES

> "There can be no sense of safety and equality among the nations if great preponderating armaments are henceforth to continue here and there to be built up and maintained. The statesmen of the world must plan for peace and nations must adjust and accommodate their policy to it as they planned for war and made ready for pitiless conquest and rivalry. The question of armaments, whether on land or sea, is the most immediately and intensely practical question connected with the future fortunes of nations and of mankind."

These remarks are taken from the address of President Wilson to the United States Senate on January 22nd, 1917, when the United States was still at peace. They are, perhaps, a little pedagogic, for it is easy for the United States sincerely to advocate comprehensive disarmament when she is distant from the world's cockpit by over 3,000 miles, and when, moreover, her own policies on the American continent can be carried out with the aid of a few squads of marines or, as in the case of Mexico, by a rapid incursion of the regular army into hostile territory. On the Rhine, on the Brenner and on the Danube the solution of the problem is apt to seem a little less obvious. However, the President, in his address, was voicing sentiments which were by no means exclusively American. The belligerent nations, already exhausted by two and a half years of warfare, were prepared to agree that some method of disarmament must be found. Throughout

human history, social groups always have been armed, and whilst warfare involved only the professional armed forces of a State, world opinion was prepared to tolerate a system of diplomacy in which the decision of the final trick was always determined by war. The Revolutionary and Napoleonic Wars, however, had indicated that contests might have to be backed up by the entire resources of a nation, both human and material, and the wars of the Nineteenth Century had done something to confirm this view. This circumstance, coupled with the rapidly increasing deadliness of the implements of warfare, had given an impetus to disarmament movements, which four years of warfare, and the extension of the consequences of warfare to civilians on sea and in towns bombed from the air, intensified. The result was that the League Covenant and the peace treaties both contemplated the achievement of disarmament within a comparatively short space of time, the peace treaties by the imposition of disarmament upon the ex-enemy powers as an express preliminary to disarmament by the League members as a whole, though not as a condition of their disarmament, and the Covenant in Article VIII, the terms of which are worthy of perusal to-day.[1]

As Professor de Madariaga has shown,[2] this Article does not stand alone. It is linked with other articles in the early part of the Covenant, designed to secure the threefold object of abolishing war, guaranteeing the integrity of members of the League, and disarmament. Yet the lesson of the war of 1914-1918 was forgotten before hostilities had properly ceased, and the history of the Disarmament Conference is a long record of human futility and interminable quibbles over non-essentials, proving a most apt illustration of Voltaire's comment upon the paucity of wisdom shown in the government of the world. Indeed, in reading the record of the various phases of the Disarmament Con-

[1] See pp. 30-31 ante.
[2] S. de Madariaga, *Disarmament*.

ference, one gathers the impression that in reality it was a "show," designed by benevolent statesmen to beguile the passing moods of the communities over which they exercised paternal care. The "show" was indeed the simplest of all political spectacles to stage, since it was easy to point to the shortcomings of other nations upon the question, and, indeed, the consciousness of one another's shortcomings was in all probability sincerely held, alike by the statesmen and Press who were responsible for the moulding of public opinion. As a correction to overmuch self-righteousness upon this question, Professor de Madariaga, in apportioning blame for the failure of successive efforts to disarm, attributes the principal share, first to the United States, and after that democracy, then to Great Britain. The arguments upon which his conclusions are based should be studied at length in his classic upon *Disarmament*, but the following observations, which also bear upon the general object of this monograph, may serve as a corrective to the generally held view in this country (a most convenient view), that the French insistence upon security wrecked all hopes of disarmament from the start:

> "Next to the United States the heaviest responsibility in the slow pace of disarmament[1] must be attributed to Great Britain. The facts are there and stare us in the face. England turned down one after another every effort made in Geneva. Though her genius it was which made the phoenix-like dove of disarmament rise again from its ashes, English were the leaden arguments which shot the bird dead again when it soared, perhaps too high, in the Protocol. Locarno is to England's credit, up to the moderate point which we have had occasion to discuss in its time. When the League Commission came to brass tacks, the English Delegation presented a draft con-

[1] This was written in 1929. The responsibility is now for universal rearmament; and in the later stages, the pace has been set by the dictatorships. Nevertheless, our own responsibility remains.

vention obviously inspired in a conservative, not to say a reactionary, estimate of the position. Naval advantages were carefully protected. Budget limitation was refused. Even the most reasonable measure of international supervision was frowned at. A restrictive and even at times a negative interpretation of Article 8 was put forward in order to preserve a freedom of armaments which it is the express aim of the Covenant to destroy. In this matter of manufacture of armaments, England pursues a policy equally at variance with the strict interpretation of Article 8 of the Covenant. The sum total of her State activities in Geneva would be dismal indeed if the work of her distinguished son Lord Cecil were not called to mind in order to restore the balance.

"Nor is this all. For we know by now that the work of disarmament is inseparable from the work of the League. We are aware of the one-ness of international life and we realize that it is needless to expect nations to acquire a peaceful turn of mind and a trustful habit whilst the bigger states follow a policy of power, zones of interest[1] and all the rest of it. Not only must the League develop in all directions, but it must remain the chief political agent for the management of current events. Now, it is painfully evident that Great Britain, which might have had the leadership of the League, as the saying goes, for the asking, has left it vacant and taken, in practically every case, a line at variance with the best interests of the world."[2]

These words were written before the decisive rebuff administered by the British Foreign Secretary to the United States in the Manchurian dispute in 1931, before the disastrous experiment with sanctions in the Abyssinian war, before the remilitarisation of the Rhineland and the rise of Nazism to menace Europe again, before the extinction

[1] A reference to the Italo-English Treaty of 1928 regarding Abyssinia, regarded by the author as incompatible with League principles.

[2] De Madariaga, *op. cit.*, pp. 256-257.

of Austria and before the destruction of Czechoslovakia and the simultaneous efforts on the part of the British Government to reduce obligations under the Covenant to the palest shadow of a bond. That the observations were written with true insight, none can challenge. That Great Britain should have pursued so consistently a policy detrimental at once to the interests of the world as a whole and to her own interests remains an enigma which the historian of the future will be called upon to solve.

The superficial critic may perhaps object that, apart from her policy at Geneva, Great Britain at least set an example to the world by her own disarmament. That, at least, is an argument very dear to the heart of official apologists, and it is an argument which requires examination. In the House of Commons on June 29th, 1931, Mr. Ramsay MacDonald said:

> "In 1914 the naval personnel of the United Kingdom totalled 151,000. In 1924 the figure was 99,453. In 1931 it was 93,630, a reduction of 57,376 since 1914, and of 5,823 since 1924. Turning to the army, in 1914 our strength was 186,420, exclusive of forces maintained at the expense of India and of Colonial Governments. The exclusion still holds good. In 1924 it was 161,600, and in 1931 148,800. There has, therefore, been a decrease of 37,600 since 1914, and of 12,800 since 1924."

Since these figures represent the maximum disarmament ever achieved by this country since 1918, they are obviously a fair starting point for discussion of the British attitude. It is plain that a substantial move towards lower armaments occurred in this country after the war, but it is in no way remarkable, for M. Blum points out that during the same years the French period of service was cut down from three years to one year, and that the French Standing Army was reduced by 254,000 men.[1] To add point

[1] M. Tardieu has said the reduction was by 400,000 men, but this is apparently incorrect. Blum, *Peace and Disarmament,* pp. 91-93.

to this, it should be remembered that during the same period the German army was reduced by treaty to 100,000 men; yet we are not a military power! It is plain, therefore, that if we are to secure a true picture of the relative value of our disarmament, we must look at it primarily from its naval side. Here, however, the number of capital ships was limited by the Washington Treaties. We had a two Power standard in Europe, whilst the only Power enjoying parity with us was the United States, with whom, as we have often been assured, war is unthinkable. It is not maintained, of course, that we did not disarm at all, but it is nevertheless submitted that, considering the relative position of the Powers after 1918, the observations of some British statesmen concerning our defencelessness can only be regarded at best as equivocal. Of course, when pressed, such statesmen could always fall back upon "the far flung Empire" as the second line of defence, and there is obviously substance in the British contention that she must have the means to guard her trade routes and scattered possessions, exactly as France must have the means to guard her Eastern frontier. The two cases are, in fact, complementary, and no useful purpose is (or was) served by concealing the fact.

It is now a truism that failure to disarm has had the most serious consequences in causing the ex-enemy nations to disregard the sections of the Peace Treaties which restrict their own armaments. The duty of the victorious Powers to disarm was express. The obligation is stated in the following terms: "In order to render possible the initiation of a general limitation of the armaments of all nations, Germany undertakes strictly to observe the military, naval and air clauses which follow." It is obviously doubtful whether those words impose a legal obligation upon anyone except Germany to disarm, although M. Paul Boncour thought they did,[1] but the moral obligation is plain for all to see, and this is reinforced

[1] De Madariaga, *op. cit.*, p. 75.

by Article VIII of the Covenant, and it is therefore quite plain that there is substance in the German claim that the non-fulfillment of these anticipations (to put them no stronger) completely altered the circumstances for her. Failure to carry out this moral obligation, and this undertaking under the Covenant, have been one of the main causes of the most disastrous armaments race under which the human race has ever suffered—a gigantic folly which threatens all nations with bankruptcy. To adopt the words of a famous British diplomat in China, since there is no reason to suppose that statesmen are by nature necessarily more stupid than other men, what is the reason for this act of apparently senseless folly which has produced in all countries choice examples of newspaper lunacy over which future anthropologists will long meditate? Of these, perhaps, the British slogan: "Armaments mean Security," with its fellow: "The British Navy is a Bulwark of World Peace," will probably hold pride of place.[1]

It is not proposed here to plunge into the morass of reports, plans, draft conventions, and records of proceedings in which the problem has been drowned. There exists a substantial literature upon the topic, to which reference should be made. It is possible only to sketch broadly the general course of the proceedings, and to indicate the principal causes for the failure of so much well-meaning effort. If Article VIII is considered, it will be found that although, as has been pointed out, it was obviously linked with other neighbouring articles, it was nevertheless assumed that disarmament was a distinct subject for League activity, upon which progress could be made, though no doubt coincidently with progress towards compulsory pacific settlement of disputes and other objects. It will be observed that all that the League could do was to formulate plans. Execution of them was

[1] On the day after the Munich Agreement, a British newspaper with a seven figure circulation announced "No More War Agreement, but A.R.P. must go on."

left to the individual States—an obvious weakness which has been emphasised elsewhere, for it left nations jealous for their sovereignty, and Great Britain, in particular, steadily refused to have anything to do with any plan which involved any relative impairment of the supremacy of the British navy or the supervision of her arms trade by "foreigners." Notwithstanding these underlying difficulties, however, the League boldly set out to formulate a plan designed to lead ultimately to a general arms convention.

Article IX provided for a permanent Commission to advise the Council on the execution of the provisions of Articles I and VIII, and on military, naval, and air questions generally. In May, 1920, acting under this Article, a Commission, composed entirely of military, naval and air officers, was set up. This Commission was unable to reach any positive conclusions of substance, and so, in November, 1920, the League Assembly established a second Commission, predominantly civilian, and known as the Temporary Mixed Commission, with the object of surveying the problem from a less narrow view-point than that of the fighting services, representatives of which were not unnaturally primarily concerned with the defence of their own countries. During the two years from November, 1920, to September, 1922, the League was concerned with what Professor de Madariaga calls the direct method of approach to the problem. Of this method, the Washington Treaties, though not concluded under the League's auspices, are the outstanding example. Professor de Madariaga is not unduly impressed with the results of the Washington Conference,[1] possibly for the reason that they were not the League's handwork, but as the present writer has pointed out elsewhere, they stabilised conditions in the Pacific for ten years, and they did so for the simple reason that the guiding spirits of the Washington Conference were able to reach a solution of

[1] De Madariaga, *op. cit.*, Chapter V.

the underlying political problem first; after which solution of the technical problem was not a matter of undue difficulty.[1] Unfortunately the importance of this was never fully realised by the statesmen at Geneva. The issue that the retention of national sovereignty over the methods of disarmament meant insecurity, because national policies would continue to conflict as before, was never squarely faced, and the interminable discussions of experts over guns, ships, and troops merely served to weary and to mystify public opinion, conscious as it was that national antipathies were rapidly rekindling.

Less successful in their achievements than the Washington Conference were two other attempts to solve the problem by direct methods, promoted by the League. These were (1) Lord Esher's plans to reduce armaments by setting up numerical ratios for the armies of the principal military powers. There were many technical objections to the proposal, but the underlying cause of its failure was that it related only to land forces, while for continental powers in general the problems of land and sea forces are inseparable.[2] (2) The Anglo-Franco-Italian proposals for extending the principles of the Washington Treaty to lesser naval Powers. Once again, no agreement could be reached. The Washington Treaty was the corollary to the solution of a specific political problem. No similar solution could precede a wider treaty, and no agreement was reached—could not, in fact, be reached, unless the problems indissolubly linked with disarmament, and notably that of national security, were also solved. Again and again these discussions broke down upon the same issues—to control armaments temporarily, instead of renouncing them altogether (beyond what were necessary for police purposes) in favour of an international authority, and their effect was to leave states with all their potential

[1] See "The Breakdown of the Washington Treaties and the Present Sino-Japanese Conflict," by the present writer, *The New Commonwealth Quarterly*, June, 1938.

[2] De Madariaga, *op. cit.*, p. 89.

offensive resources untouched, so that so long as national policies were based ultimately upon force, a disarmament convention merely delayed the achievement of maximum efficiency by the combatants.[1]

In 1922, Lord Cecil formed the Temporary Mixed Commission, and under his guidance it proceeded to investigate the problem in its wider aspects, since it had now become evident that there could be no agreement upon disarmament without a guarantee of security to the signatories. There it may be noticed that already the beat of the international pulse had changed. There was a guarantee of security in the Covenant, but members apparently regarded that as insufficient. It may have been because the United States and Russia were outside the League (Germany was disarmed), it may have been the League's unsatisfactory handling of the Polish-Lithuanian dispute, but above all, it may have been the cooling of enthusiasm of member States for League principles, of which the handling of the Vilna and Corfu episodes were merely outward and visible signs, which brought about the changed attitude, but it was unmistakably there. When an obligation needs reinforcing by further specific obligations, it is not unnatural to assume that the first obligation is regarded as less binding than it was originally. League statesmen attempted to disguise this difficulty by declaring that this was doing no more than fill up gaps in the Covenant. In fact, they were concentrating upon the maintenance by force of the Versailles settlement, thereby implicitly closing the door on peaceful revision. It was unfortunate, but if any progress was to be made in the changed international atmosphere, it was necessary to accept this unsatisfactory assumption as a starting point, and Lord Cecil's efforts were therefore primarily devoted towards the drafting of a general Treaty of Mutual

[1] Professor de Madariaga points out that many disarmament Conferences might more properly be termed armament conferences, since national delegations sought to secure disarmament of such a character that their own national strength would be increased.

Guarantee.[1] This phase of activity in relation to disarmament and security obviously closely coincided with France's political policy of seeking to make the obligations imposed by Article XVI more precise, and of seeking to build up a system of alliances with Powers whose interests were in the first place directed to the maintenance of the *status quo* in Europe. Apart from this, however, Lord Cecil's efforts failed to win the support of Great Britain and a number of other States (including the Scandinavian countries) less directly interested in the maintenance of the Versailles territorial settlement. The result was that both the Draft Treaty of Mutual Assistance of 1923, and the famous Geneva Protocol of 1924 were still-born. At no time subsequently did the members of the League proceed even so far as this towards the realisation of one of the most important of their declared aims. The part played by Great Britain in this retreat from international solidarity is instructive. The Draft Treaty had been prepared when a Conservative Government was in office, though without their active support. When the Assembly of the League remitted it to the member States, the first Labour Government was in office, and Mr. Ramsay MacDonald rejected the Draft Treaty on the ground that the guarantees were insufficient to justify any reduction in armaments. Accordingly the British Labour Premier took a leading part in sponsoring the Protocol, which was designed to remedy this defect. When this, in turn, was remitted to the several Governments, Mr. Ramsay MacDonald had been replaced by Mr. Baldwin, who rejected it (and in so doing rightly interpreted the more vocal part of British public opinion) on the ground that the Protocol went too far in guaranteeing the *status quo!* The "foreigner" may perhaps be forgiven if he sometimes regards our approach to international problems as tortuous. As a matter of fact, the Protocol contained a carefully devised machinery of

[1] De Madariaga, *op. cit.*, p. 94.

arbitration, flexible and comprehensive, designed to amplify that established in the Covenant.

The failure of the Protocol saw the initiation of a less ambitious attempt to promote security, and so indirectly cleared the way for disarmament, in the signature of the Locarno Pact, with its joint guarantee of *status quo* in the West. At the time, it was hailed as a masterpiece of diplomacy (it was obviously dear to the hearts of all loyal Conservatives in England), and British opinion proclaimed it to be the crowning achievement of Sir Austen Chamberlain's career. Its value has proved singularly shortlived. Growing antagonism between Great Britain and Italy resulted in a re-alignment of Germany and Italy on the one hand, and of Great Britain and France on the other. The failure to conclude a similar pact, guaranteeing Germany's Eastern frontiers, largely due to British refusal to have anything to do with it, in spite of the fact that where France was concerned, there in the last resort must we be also, was an obvious weakness. It may have been that this deep-rooted instinct against assuming what were blithely termed by the British press "new commitments" was entirely sound, but if that were true, of what ultimate value was the Locarno Pact, if France went to war in defence of her Eastern allies and was overwhelmed? Besides, the Conservative section of the British press conveniently overlooked the fact that under the Covenant, Great Britain was in the last resort already committed to a guarantee of the integrity of every one of Germany's Eastern neighbours—or was the Covenant already jettisoned in 1925? Which ever way you look at it, the Locarno Pact implicitly reverted to the older system of protective guarantees for limited areas, and to that extent tended to minimise obligations under the Covenant. It may be objected that under Article XVI of the Covenant, Great Britain was not legally bound to do anything at all unless she chose to do so, but if every state took that view of its obligations, did not that reduce the value of

the Covenant almost to vanishing point? Was it not, in fact, the dangerous delusion which the smaller nations, after 1935, felt it to be? Support is lent to this contention by the initiative taken by Great Britain for the modification of Article XVI presented to the League in 1938. Great Britain, in fact, could not have it both ways. If Article XVI was the charter for the smaller States, the Locarno Pacts were unnecessary; if the Locarno Pacts were necessary, then Article XVI was misleading. Unfortunately British public opinion, as reflected in the Conservative press, did not attempt to solve this dilemma. Finally, it may be noticed that although, under the Locarno pacts, remilitarisation of the Rhineland would result automatically in the guarantees provided by Great Britain and Italy being invoked, in fact, this remilitarisation produced no such result, *because the underlying political circumstances had changed at the time of the breach of the Treaty*. Once again, the machinery of pacification had failed because of the retention of force by the signatories as the ultimate basis of their national policies—in other words, because no State was prepared to cross the bridge between the independence of action implied in the retention of national sovereignty, and collective security based upon surrender of the means of prosecuting "power politics." Against this failure of the Locarno Pacts must be set the temporary adhesion of Germany to the League of Nations (1926-1934).

The next step after Locarno was to seek the achievement of some measures of disarmament by further general League activity if that were possible. It was not, but the attempt was nevertheless made. The Temporary Mixed Commission finished its labours in 1924. In its place, a further Commission, the Preparatory Commission, set to work to prepare a programme for a Disarmament Conference. The United States and Russia co-operated with the Commission. It was soon found that disarmament and security were still inseparably joined in the minds of dele-

gates, and accordingly, it was necessary to tackle more or less coincidently the three linked problems of security, peaceful settlement of international disputes, and disarmament. The result was the creation of the Commission on Arbitration and Security in 1927, one of the main objects of which was to study measures by which it would be possible for the League to promote and to co-ordinate agreements, bilateral and multilateral, on arbitration and conciliation. These efforts resulted in three draft general conventions, and three draft bilateral conventions.[1] At the outset, these conventions failed to commend themselves to the Great Powers, however popular they may have proved with the smaller ones. In other words, none of the Great Powers was as yet convinced that in the long run it would benefit more by the peaceful settlement of international disputes than by reserving for some unspecified future emergency the right to resort to war. Once again, conflicting national egotisms prevailed over the desire for co-operation. The root of the British objections is contained in the following extract from its note:

> "Arbitration treaties have no sanction behind them but the force of public opinion of the world at large. An arbitration award which a party to a dispute resolutely refused to execute would not merely fail to settle the dispute, it would prejudice the movement in favour of arbitration."[2] The appropriate conclusion to be drawn from this is that arbitration awards need some more binding sanction. The British conclusion was that arbitration treaties were useless. Other states drew similar conclusions, and freedom of action remained unimpaired. On the other hand, the reply of the German Government went to the root of the matter. "If the bodies (it said) which are called upon to pronounce the final decision are invested with sufficient authority, and if the limits of

[1] de Madariaga, *op. cit.* pp. 139-141.
[2] J. Wheeler-Bennett, *Disarmament and Security since Locarno*, p. 284.

> their competence are defined with the requisite exactness, it is hardly likely that a State would dare to disregard such a decision."

The three draft general treaties on arbitration and conciliation were eventually united into one comprehensive treaty, the General Act for the Pacific Settlement of International Disputes, unanimously adopted by the Ninth Assembly of the League in September, 1928. The British Government failed to regard this agreement with any favour, but when it was replaced by the Labour Government in 1929, Great Britain and the Dominions acceded to the General Act with reservations.[1] It should be noted that in the meantime, the Briand-Kellogg Pact outlawing war had been drafted and adopted.

Two other methods of preventing war by non-combatant means which deserve brief mention are the Convention for Financial Assistance, adopted by the League Assembly in September, 1929, and designed to place the financial resources of members of the League at the disposal (as guarantors) of members who were attacked, and the General Convention to improve the Means of Preventing War, of 1931. The general objects of this convention were to remove from the requirement of unanimity under Article XI of the Covenant the parties to the dispute, and to elaborate military and non-military measures for preventing any aggravation of the dispute. This process of improving the procedure for giving effect to the Covenant was not welcomed, however, for no member of the League signed this self-denying ordinance, the implications of which were plain for all to see.

Apart from these (and other) measures planned from time to time with the object of securing that disputes

[1] On February 23rd, 1931. In a letter written by Sir George Mounsey, Assistant Under-Secretary at the Foreign Office, to the Secretary-General of the League of Nations on 13th February, 1939, it was stated that the British Government will not consider themselves bound by the General Act after August 16th, 1939, "should they unfortunately find themselves involved in hostilities." (Cmd. 5,947.)

between States should be settled without resort to war, the League engaged in parallel activities with the object of promoting the security of member-States. Thus, in September, 1927, the League Assembly adopted the following resolution:

> "The Assembly recognising the solidarity which unites the community of nations, being inspired by a firm desire for the maintenance of general peace, being convinced that a war of aggression can never serve as a means of settling international disputes and is, in consequence, an international crime, considering that a solemn renunciation of all wars of aggression would tend to create an atmosphere of general confidence calculated to facilitate the progress of the work undertaken with a view to disarmament, declares:
>
> "(1) that all wars of aggression are, and shall be, prohibited;
>
> "(2) that every pacific means must be employed to settle disputes, of every description, which may arise between States."

This was followed by the Kellogg Pact of 1928, which though not negotiated under the auspices of the League, must be regarded nevertheless, as a landmark upon the long road towards the suppression of wars between States, although as Professor de Madariaga comments, it is "so far as the League is concerned, a rough and incomplete sketch of the Geneva Protocol having, however, practically the same results so far as outlawry of war is concerned." As far as non-Member States are concerned, it is "an instrument of moral discipline without any guarantee of actual efficiency."[1] It is incomplete, because it stands unrelated to the problems of security and disarmament, upon which successive League efforts have broken down, and its treatment by prominent signatories justifies Pro-

[1] de Madariaga, *op. cit.*, p. 203.

fessor de Madariaga's criticism. The Pact may have changed the technique of aggression, but it has done no more. For the more obvious aggression of the pre-War period is now substituted by "intervention to restore order" or even as in the case of the Sino-Japanese conflicts of 1931 and 1937-38, "intervention to preserve peace." Even here, however, had the necessary machinery for consultation existed, it is possible that the existence of the Pact might have proved a factor of some importance, at any rate in Far Eastern disputes, where the United States has obvious interests to protect. Thus, when China and Russia engaged in minor hostilities in 1929 over the Chinese Eastern Railway problem, the American Secretary of State took the initiative in promoting consultation under the Pact, as a result of which the United States, Great Britain, France and Italy sent identic notes to Moscow and Nanking. When they arrived, however, hostilities had already ended.[1] Although the seriousness of the lack of machinery for consultation was fully realised following this incident, and was in fact discussed during the London Naval Conference, nothing was done to remove this defect. It would seem that the United States had in mind the possibility of a fact-finding commission, such as was established by the League in the Manchurian dispute. Obviously, if no further action by the States was expected, such a procedure was bound to be ineffective, as the Manchurian affair sufficiently proved. So far, however, the United States has given no sign that anything more than her moral support would be afforded in any effort to deter an agreement outside the American Continent and the Far East.

There remains for consideration the principal efforts of the League to achieve disarmament between 1924 and the breakdown of the Disarmament Conference in 1931. Mr. Wheeler-Bennett justly observes of the situation in 1925:

[1] Wheeler-Bennett, *op. cit.*, p. 269.

> "Within the Assembly itself the principal question was what to do with the Geneva Protocol. Ever since Mr. Austen Chamberlain had given this instrument the *coup de grace* at Geneva in the previous March its supporters had piously waited for some miracle of phoenix-like resurrection and its opponents had clamoured for a decent burial. This has not heightened the reputation of the League in the public mind. The fact that for two years in succession the Assembly had solemnly adopted a general instrument for the indirect reduction of armaments, which had been repudiated in the interval by the respective Governments of the States members of the League, had increased the disbelief of many and had seemed to justify the sceptics in their original mistrust of the League's efficiency."[1]

The whole issue is here put in a nutshell. Imagine for a moment that the world (or even those States which are members of the League) was governed in accordance with the pacts and conventions adopted by successive Assemblies of the League; can anyone seriously maintain that it would not be incomparably more prosperous and secure? Or, on the other hand, suppose that the United States were governed in the same way as the members of the League have attempted to govern the world through the Assembly and the Council. Can anyone doubt that the United States would be an incoherent and poverty-stricken collection of mutually distrustful communities. And yet the nations of the world have reduced the Assembly of the League to a status of a debating society and have expected nevertheless to solve the most complicated problems of international government which the human intellect has ever been called upon to consider. It should be noticed that when the question of disarmament was resuscitated at the Assembly's Third (Disarmament) Committee in 1925 the Italian delegate objected to the holding

[1] ibid., p. 43.

of a disarmament conference at all, on the ground that it would "infringe unnecessarily upon national sovereignty."[1] Other nations put the same point less ingenuously.

Notwithstanding this noticeable lack of enthusiasm the Preparatory Commission for the Disarmament Conference began its labour at the end of 1925, assisted by two advisory bodies, one of military experts and the other to advise on economic questions. The United States co-operated with, and in 1927, Russia actually joined the Commission. From the outset it was clear that disarmament without security would be an impossibility. Nevertheless, amid increasing discrepancies between national points of view, the Preparatory Commission proceeded to discuss an increasingly formidable pile of technical and semi-technical material. Moreover, although France desired to see a general disarmament conference summoned for 1927, Great Britain wished to postpone the definite fixing of a date, pending a more complete examination of the entire problem.[2] Finally, although M. Paul Boncour pointed out that an international convention which merely prevented increases in armaments would be an advance, the German delegate ominously pointed out that a convention which did anything less than scale down the armaments of League members to those of Germany would be unsatisfactory.

By March, 1927, the work of the Preparatory Commission had proceeded sufficiently for Lord Cecil to present to it a Draft Convention to serve as a basis for discussion.[1] This immediately evoked a counter-draft from the French delegate, the only point of contact of which with the British draft was that both regarded the maximum achievable as the limitation and not the elimination of armaments. One most important point of cleavage was over the question of the international supervision of the limi-

[1] ibid., p. 45.
[2] ibid., pp. 55-56.
[1] ibid., p. 58.

tation of arms. The British Draft absolutely rejected it; the French regarded it as essential. The American representative accepted the principle of international control, provided that the United States was excluded from its purview! The root of this objection was America's firm refusal to have anything to do with the League system as such. The conclusion was a draft convention prepared for discussion at a later date.

The differences of opinion revealed by the two Drafts, and emphasised in general discussion, were so fundamental that it was not possible to consider the Draft Convention again until 1929. In the meanwhile, the differences had been exhaustively discussed, but were no nearer solution, and Russia had made, at the end of 1927 (following her entry into the Commission), her famous proposal for complete disarmament. It has already been pointed out that even complete disarmament, without its corollaries of security (with the necessary adjunct of an international police force) and arbitration (in the broad sense) is no solution at all. Moreover, as Professor de Madariaga has pointed out, the proposal was especially favourable to Russia, inasmuch as the principles upon which her policy is based depend for their general achievement upon propaganda rather than upon armed force. The proposal was rejected without serious discussion, whereupon M. Litvinoff produced a second draft convention for partial and gradual disarmament, security and collective responsibility for the preservation of the peace, which was a valuable contribution to the problem,[1] but the Preparatory Commission declined to scrap the work it had already done and make a fresh start upon the lines indicated by the Soviet Delegation in its second proposals. Accordingly, the draft prepared at the end of the discussions in 1927, was again considered, though once more without any of the fundamental discrepancies in national points of view being resolved. Finally, the Draft was considered by the

[1] ibid., pp. 237-239.

Commission yet a third time in 1930, although the atmosphere upon this occasion was even less favourable than in former years, for Stresemann had died on October 3rd, 1929, and Germany's increasing lack of sympathy with the League was already apparent. Germany, in fact, was in the throes of the great transition from co-operation in the building of the fabric of peace in Europe towards a policy of "direct action,"—of threats based on naked force,—the manifestation of which externally was merely the complement to a similar intolerant exercise of it within her own borders. Moreover, although the London Naval Conference of 1930 had produced limitation between Great Britain, the United States and Japan, France and Italy had declined to accede to it, because Italy was demanding naval parity with France, while France declined to disarm further without additional guarantees of security. This was by no means unreasonable in the circumstances, since the revisionist aspirations of Italy, Germany and Hungary, together with several other supporters, were already receiving ample expression, thus leading to rapid deterioration in Franco-Italian relations. The proceedings of this session of the Disarmament Commission were therefore characterised by persistent reservations and objections by Italy and Germany, and increasing nervousness on the part of the other members to any limitation of their freedom of action. In response to steady German pressure, however, the date of the opening of the Disarmament Conference was at last fixed for January 2nd, 1932, under the presidency of Mr. Henderson. This done, the draft convention in its final, and very modest form, was submitted to the Governments of member-States. In one respect, the draft of 1930 represented an important advance upon the draft of 1929, in that it substituted budgetary limitation for publicity as a method of control. The draft also included provision for a Permanent Disarmament Commission.

In its issue for December, 1932,[1] *The Round Table* observed:

> "There is general recognition that we have reached a crisis in international affairs. Newspapers and politicians alike assert that on the issue of the Disarmament Conference and the Manchurian deadlock will depend the question whether there is to be a strengthening of the system of international relations represented by the League of Nations and the Kellogg Pact, or a new race of competitive armaments which is bound to end in another and more destructive world war."

To-day we have the answer to both questions. The Manchurian deadlock was followed by the Abyssinian disaster, the civil war in Spain, the new Japanese attack on China, the destruction of Austria, the destruction of Czechoslovakia and the annexation of Albania. The League system has ceased to be a political reality. It survives as an idea only, while the armament race grows even more acute. For the moment there is a respite, but no security.

It will be apparent from this brief survey of the preparation which was undertaken prior to the Disarmament Conference that the prospects even of very moderate success were never high. In fact, it proved to be a decisive failure and its doom was sealed when Germany withdrew from the Conference and the League in 1933, and embarked upon her policy of rearmament in defiance of the terms of the Treaty of Versailles. Her declared reason for doing this was that the ex-Allied Powers had never fulfilled their promises to disarm and it was idle to expect that they ever would. The Hitler régime was now dominant in Germany, and denunciation of the Versailles Treaty was universal. With Germany in such a mood, the French reaction was a foregone conclusion. Before

[1] p. 1.

the débris of the Conference had been finally cleared away, Italy was preparing her deliberate attack upon Abyssinia, and Great Britain was hastily rearming. Since then, events have followed in logical sequence. There has been a progressive deterioration in international relations, followed by still more feverish armament preparations, which in turn have led to still further deterioration in international relations, so that general war has been avoided only with difficulty.

CHAPTER VII

The Attack Upon the Concept of Sovereignty in Relation to International Law

One of the most striking features of modern political and juristic theory has been the many-sided attack which has taken place upon sovereignty. We have already seen how the conception of an absolute and irresponsible national sovereignty has thwarted any true organic growth of the League of Nations as an international administrative body. Such a conclusion, therefore, leads logically to a consideration of the necessity for the preservation of such a concept. In such an investigation, there are two possible lines of approach: (*a*) the purely theoretical, and (*b*) the functional. The two are not independent of each other. Theories of sovereignty necessarily assume, to a large extent, the colour of the times in which they are elaborated. Conversely, abstract theories of sovereignty may be made pegs upon which to hang arguments for or against some line of activity in the international sphere. No useful purpose is served, however, by confusing these two entirely distinct lines of approach.

As has already been indicated there is to-day a many-sided attack upon what may for convenience be termed Austinian absolutism in connexion with State sovereignty. According to Austin absolute sovereignty was an attribute of an independent State, and therefore international law was not law at all, but positive morality. One of the most comprehensive attacks has been made by Kelsen, whose theories have recently made considerable impression upon English legal thought.[1] According to Kelson, jurispru-

[1] Kelsen, *Das Problem der Souveränität.*

dence is a "pure" science, whose aim is to separate the legal norm from all extrinsic elements. It seeks a logical unity as the true method of juristic speculation. Accordingly, he attempts to divest the concept of sovereignty of all political associations, with the object of determining the purely juristic nature of the concept. Now, according to Kelsen, law is simply a hierarchy of norms, having exclusive validity within a community, and obliging the members to a course of conduct. So far, Kelsen seems to be doing little more than restating the Austinian position, but there is a fundamental departure, marked by Kelsen's treatment of the State. According to Austin, the state was the authority from whose omnipotence alone law derived its validity. Kelsen attacks this point of view decisively. To speak of the state in such terms, he argues, is to take refuge in fictions. The state is not a legal personality at all. The state is simply the entirety of the legal order. His striking parallelism between the creation of God and his attributes by orthodox theology, and the creation of the state and its attributes of sovereignty is well-known.[1] The equation of the law to the state is by no means peculiar to Kelsen in modern jurisprudence. Krabbe, for example, accepts it for the modern constitutional state. However, having defined the state as the legal order, Kelsen then explains that sovereignty simply means that the legal order is a logical unity, distinct from other systems of norms. Unlike Austin's, this explanation includes no reference to all-powerful physical force. The obligatory character of law is not derived from the application of force, inculcating the habit of obedience, but from the logical obligation implicit on the binding force of a superior norm placed in relation to an inferior one.

This might seem to reduce jurisprudence to the status of a logical exercise, bearing no necessary relationship to material phenomena, but Kelsen hastens to add that the exterior justification of a legal order is to be found in its

[1] ibid., p. 21.

ability to supply an accurate interpretation of existing social relationships. This concession to material reality gives added value to Kelsen's view of international law, and its relationship to municipal law. Having rejected the legal personality of the State, it is clear that Kelsen is necessarily at odds with the conventional attitude that international law is simply a law between states, as distinct from municipal law, which is a law between persons. He is in entire agreement with Krabbe that the subjects of international law are not states, but individuals. This renders it necessary to consider in detail the relation of municipal to International Law. Kelsen will not concede primacy to municipal law, nor even dualism.[1] There is, he contends, a world legal order, embracing the subordinate legal orders of lesser communities. That world legal order may assume a form different from that of the lesser communities, but it exists, nevertheless. Accordingly, it follows that international law has precedence over municipal law.

To this it will immediately be objected that the existence of a world legal order is simply an arbitrary assumption, and that it would be just as consistent to assume that there was no world legal order, but simply a collection of legal orders in a number of distinct communities. The resolution of this dilemma, he says, can only be achieved by wider philosophical considerations. The primacy of municipal law, he points out, is simply an application of the purely subjective outlook, substituting the conception of the state

[1] In view of the attitude taken up by the P.C.I.J. towards this question it is perhaps doubtful whether this concession is sufficiently realistic. See particularly the judgment of the P.C.I.J. in the case concerning certain German interests in Polish Upper Silesia, May 25th, 1926 (Series A.7., p. 19): "From the standpoint of international law and the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States in the same manner as do legal decisions or administrative measures." See, however, C. W. Jenks, *The Interpretation and Application of Municipal Law, by the P.C.I.J.* He warns against attaching "undue importance" to this remark. British Year Book of International Law, 1938, p. 68.

for the individual *ego*. The doctrine of the primacy of international law, on the other hand, is the result of the application of the objective attitude. Kelsen points out, however, that a rigid application of the subjective outlook must lead eventually to a denial of law in the municipal as well as in the international sphere; but his most striking conclusion is that there is a close association between the subjective conception of law—with its assertion of state sovereignty, and its consequent assertions of the primacy of municipal law, and of aggressive imperialism or nationalism—on the one hand, and between the objective theory, asserting the primacy of international law, and internationalism on the other. At present both theories are contending for mastery, but Kelsen, basing jurisprudence ultimately upon the principles of reason, necessarily concludes that objectivism and international law will win. Eventually, that is to say, State sovereignty will be replaced by a true international organisation.

These views, of which only a very brief summary has been given, have placed Kelsen not only in a commanding position from the standpoint of abstract jurisprudence, but equally among those who are seeking to evaluate the struggle for international order in terms of law. To a considerable degree, as has been mentioned above, the theories of Krabbe, and through him, of many of the Dutch School, are in agreement with Kelsen's.[1] It is by no means necessary to adopt Kelsen's special line of approach, in order to experience a feeling of discomfort concerning the juridical foundations of modern international law. For example, the theories of Jellinek have exercised a very widespread influence upon modern juristic thought, more particularly in Germany, and one interpretation of his views was written widespread over the earlier editions of Oppenheim's International Law, which now has undisputed primacy among text books upon International Law in England. It would seem, however, that the full impli-

[1] C. F. Jitta, *The Renovation of International Law.*

cations of Jellinek's theories have not been considered in relation to International Law. The central proposition of Jellinek's theory is that the State, by creating law, binds itself to fulfil it. This is a mature conception, found only in highly developed systems, but both constitutional law within a state, and international law, binding a state in its external relations, depend upon such a theory. True, constitutional law has progressed somewhat further from the standpoint of its obligatory character than international law; but the latter, based originally on the consent of individual states, has been generally accepted for so long that it can now be said that in this direction, too, there has been auto-limitation.

Consideration of these arguments, set out by Jellinek himself at some length, and obviously substantially lacking to-day the validity which they possessed prior to 1914, has deflected attention, at any rate in the sphere of International Law, from the significance of Jellinek's theory of sovereignty, especially in its application to the problems arising out of the creation of the German Empire. Yet it was this aspect of his theory which gave to Jellinek the pre-eminence among German and European jurists which he enjoyed. "Sovereignty," he says, "is that proportion of a state force due to which it has the exclusive capacity of legal self-determination and self-restriction," that is to say, that is sovereign which cannot be limited in its activities, except with its own consent. It follows, therefore, that sovereign states can consent to union with other states in federation, transferring sovereignty to the new organisation but leaving their state organs unimpaired. Such a doctrine was obviously palatable to the member States of the German Empire. Their individual existences remained unimpaired, even though they had made a formal surrender of sovereignty to the federation. Since, as Jellinek points out, constitutional and International Law are similar in kind, although International Law has not yet approached the degree of obligatoriness achieved by

constitutional law, surely Jellinek's theory in its implications supplies a clue to a possible course of development in the international sphere. International Law, as an increasingly firm inter-relationship between sovereign States might obviously evolve by a similar transference of sovereignty to some new federal authority, leaving state organs as unimpaired as were those of the German states after 1871. If the same coherence were obtained in the international sphere as was achieved in Germany between 1871 and 1914, Jellinek's theories would be a cheap price to pay for it. As we have seen, however, in the League Covenant the States were careful to refrain from any surrender of sovereignty at all.[1]

The juristic theories of Jellinek were propounded as an explanation of the federal character of the German Empire. The theories of Leon Duguit are an interpretation of social phenomena which seemed to him of increasing importance, especially in the France of the Third Republic. He is tempted to regard the apparent unity of the State, even of the nation-State as a fiction. In some cases there is obvious disharmony between the terms nation and state (for example in Austria-Hungary), but even where such disharmony is not immediately apparent, it is possible to see within the borders of any political community a number of associations whose essence is not necessarily mere recognition by the state of orthodox theory. Indeed, Duguit has very little use at all for the state of orthodox theory. He regards it as a fiction, and he considers it to

[1] Jellinek's theory was, of course, not the only one explaining the German Empire. Gierke, for example, regarded the federation as a corporation of member states, exactly as the state was a corporation of individuals. There are obvious possibilities in such a theory as a basis for International Law. Again, Seydel regarded sovereignty as continuing to reside in the member states and not in the federation. This theory, the opposite in some ways of Jellinek's, might also have distinct advantages in inducing states to accept closer association than they have hitherto done. The theories discussed in the text are chosen simply because of the extent of their influence in modern juristic thought, and a large volume could have been compiled upon these and other theories in their relations to International Law.

be his duty to strip all legal phenomena of their encumbering fictions. The methods he adopts, however, are very different from those of Kelsen. Kelsen wishes to isolate the purely normative element in a legal order based ultimately on logic. Duguit, on the other hand, seeks the social reality behind rules of law and political organisation. He sees law working to facilitate the achievement of certain well defined sociological ends. A rule of law is, or should be, an element facilitating better social organisation; and the test of what is better is, whether or not it promotes social solidarity (or interdependence)—a conception which is derived ultimately from the sociology of Durkheim. This sociological theory of law, with its innumerable by-paths in the domain of modern law, is a theory which also has exercised considerable influence upon jurists and political theorists in England and the United States. It is noticeable that Duguit accepts Durkheim's social philosophy with somewhat uncritical enthusiasm, and accordingly the validity of his theories is bound up with the validity of Durkheim's. If this is rejected, then Duguit's edifice in turn collapses. That, of course, is a juridical problem which does not call for solution here. Duguit's legal philosophy has had a very wide influence, however, because it has expressed certain fundamental truths more clearly than these have been expressed before. The historical jurists explained the manner in which law changed. The sociological jurists explained *why laws changed in that manner* in terms of human activity. They exposed the social forces whose interplay was reflected in legal reform. Whereas the Austinian said that the sovereign is legally free to make any law he chooses, Duguit replied that "sovereign" is merely a euphemism for those who have temporarily placed themselves in control of a community, and pointed out that plainly defined social forces would direct their activities in law-making. It is because Duguit in this fashion brings the sovereign tumbling down from his pedestal that there runs throughout his

works a profound distrust of the irresponsible exercise of authority. He wishes to see even legislatures and Foreign Offices responsible to the individual for their actions. In this aspect of his theory Duguit most cogently expresses the distrust of the French *petit bourgeois* for the official which has been responsible for a number of interesting legal experiments in the Third Republic, many of which Duguit describes with great clarity. Now these, although Duguit virtually ignores this aspect of the matter, have a significance in International Law. If the French citizen should be able to seek redress from the French Foreign Office for the consequences of diplomatic activity abroad, why should not a British or an Italian citizen? There may be an answer to this, though it is doubtful whether Duguit would have given it (the Fascist or the Nazi on the other hand unquestionably would), in the hypothesis that the only social solidarity which should be promoted, or even which can be promoted, is the solidarity of the national community. Since, however, Duguit has already rejected the state and the nation as satisfactory bases of his social solidarity, it would seem that even logically, as well as sociologically, Duguit should have been led to predicate the existence of one international social solidarity. At the beginning of his *Manuel de Droit Constitutionnel,* indeed, Duguit admits this, but adds that at present men are slow to recognise this fact, and therefore limit their efforts to the achievement of solidarity within lesser groups. The disciple of Duguit must recognise, however, that the theories of this great jurist are probably one of the completest arguments in favour of international organisation and of an international law which confers on the individual both rights and duties, which have been elaborated, even if the qualification is admitted that Duguit uses the term right in a special sense.

Among those who were originally greatly influenced by the vigour of Duguit's arguments was Harold Laski. In his published works, however, that political theorist

has now taken up a distinct position of his own. Of Laski, a recent critic has well said:

> "The course of Laski's thought reveals the influence of German sociology as it filtered in through Barker. It reveals the influence of the positivistic sociology of Duguit and of his antipathy to the sovereignty concept. It reveals the strength of English liberalism's insistence on the individual, and of English socialism's demand for economic democracy. It reflects the transformation, the maturity of Laski's thinking as he met the political problems of twentieth century democracy under a capitalistic economy which was finding itself unable to satisfy the new emergent labouring classes in their trade unions and associations. It shows how Laski found it necessary to cease disdaining the discredited state and instead reinstate it in its previous functions with but minor changes. In spite of it all, however, Laski remained steadfast in his rejection of sovereignty, its monistic connotation and its element of dominating command making it always irreconcilable with the actual pluralism in society."[1]

The essence of Laski's theory of political pluralism is that the state is merely one of the groups which compete for the allegiance of human beings. Its continued existence therefore depends upon the general concurrence of its citizens with the state's apparent purpose, and their allegiance is necessarily conditioned by the existence in them of other allegiances with obligatory force. This obviously robs the conception of state sovereignty of all vitality, and transforms the state into a federation of harmonious associations, of which the state is simply the co-ordinating agency. Moreover, in his *Authority in the Modern State,* he points out that the individual, because of his many allegiances must be free to make his decision as he thinks right, for his allegiance to the state must be secondary to

[1] H. E. Cohen, *Recent Theories of Sovereignty,* p. 109.

his allegiance to society as a whole. This is a line of argument which has not been pursued by Laski with the fulness which might have been anticipated. The problems of conflicting allegiances are looming steadily larger in our political life. As far as the trade union movement is concerned, since the General Strike, 1926, the problem of conflict has been avoided on major issues by the totally illogical distinction between "industrial" and "political" spheres of activity. What has been empirically resolved in this way as far as domestic politics are concerned is now, however, producing a fresh crop of problems with regard to the external activities of the state. Recently, in seeking to extract from the government of the day pledges concerning the purpose of rearmament, the English trade unions have shown an uneasy consciousness of a new allegiance, transcending that due to the state. As yet, however, the method by which that allegiance shall be translated into a living reality remains unsolved, but the fact that its existence has been recognised is in itself a striking fact, which has provoked a good deal of unintelligent criticism amongst those who are apparently unable to recognise the progressive and changing character of all theories of sovereignty. Thus, *The Times* observed on September 2nd, 1938:

> "Two important and possibly grave decisions lie before the Trades Unions Congress which will meet next week in Blackpool. One of the matters to be raised touches the control of foreign policy and the other the direction of domestic affairs, the immediate subject being rearmament; and the Congress will be confronted with a choice critical, perhaps, for itself and the trade unions and for democracy. Certain of the unions are putting forward proposals for trade union action which embody a claim that the unions collectively or even individually, if they are strong enough, are entitled to establish a censorship on government policy and, ignoring the relation of the

> Government to Parliament and the people's elected representatives, to require conformity to a policy which they advocate themselves. In the circumstances of the time the application of this theory would have the effect of substituting the policy of the Parliamentary opposition for the policy of the Government, and that would mark the beginning of the end of Parliamentary democracy. Any proposal to negative or overturn by direct trade union action, as by equally direct inaction and passive resistance, a Government based on Parliamentary election with adult suffrage as we have in this country is flagrantly contrary to the spirit and the working of the English Constitution."

These unfortunate observations completely misconceive the problem and are also illogical. They are illogical because the introduction of a national government in England did not "mark the beginning of the end" of local government in England. On the contrary local government has never been so vital as it is in England to-day, having been reinforced and extended by encouragement from the central government. So also with national and international government. The observations misconceive the problem because they assume that there is only one possible allegiance for a trade unionist in the circumstances of the case. On the contrary, there are four —to the union; to the international working classes; to the state; and to the international community as a whole. If the first, second and fourth of these appear, on a particular problem, to coincide, that should at least suggest the possibility that the state is a little out of step. If, as actually occurred, the Trades Unions decided that the recognition of their obligations to the international community should continue to be expressed through the activities of the Parliamentary Labour Party, that was in no sense a renunciation of the higher allegiance, but merely a recognition that in the present state of international organisation the

methods required for giving it effective realisation must be limited.

Recognition of this problem has recently been responsible for further striking announcements amongst a different section of the community. In a presidential address to the Joint Synod of the Convocation of York on June 3rd, 1938, Dr. Temple, Archbishop of York, after tracing the failure of the League to restrain aggressors, said that the concern of Christians as such with the problem of international relations was centred upon the establishment of justice, the increase of goodwill, and the harmony of all peoples in one Family of God.

These observations formed the foundation for a pronouncement which was signed by the Archbishop of York, ten bishops and other prominent churchmen. It runs as follows:

> "We who sign this statement represent a great multitude who have been rendered anxious about the moral basis of foreign policy and rearmament as a result of the recent trend of events. It is to many people far less evident than it was three years ago on what moral principles foreign policy should be based, and in what conditions it may be justifiable to have recourse to armed force.
>
> "We are persuaded that the deterioration in this sphere, which is universally acknowledged, is due to the failure to stand by principles which they professed on the part of the States members of the League of Nations at various critical points; we mention two—the failure to take any kind of effectual action on the Lytton Report after the invasion of Manchuria, and the holding up of sanctions in the case of Abyssinia at the point where they might have begun to be effective; in both cases our own country had a large measure of responsibility.
>
> "At present we are confronted with situations in China and in Spain which give rise to grave mis-

givings, and all are aware that similar situations may arise at any time in central Europe.

"We desire, therefore, to affirm that the supreme goal of foreign policy should be the establishment and maintenance of international law. It seems to be assumed that our country would resort to war in self-defence, which is generally understood to include defence of the territorial integrity of the British Empire; from that we do not dissent, though we should wish the decision whether a *casus belli* exists to rest with an impartial authority, unless a territorial aggression has actually taken place.

"But we wish to affirm with all possible emphasis that there is clearer moral justification for the use of armed force in defence of international law than for a war of the old type in defence of territorial possessions or economic interests. And we are far from satisfied that this order of moral priority is universally accepted by our fellow-citizens or by the Government.

"Several examples might be given of what we mean. The continued wars in China and Spain, accompanied, as they are, by the most appalling suffering of the civilian population, including women and children, constitute clear breaches of both law and morality. Perhaps the clearest instance of a single factor to which both national interests and international law are applicable is the bombing of British ships in Spanish harbours. Those ships are acting lawfully, and the attacks on them are unlawful. Not so much in defence of British interests as in defence of law, we hold that the Government should take effectual action to check these outrages and face considerable risk with that object. We have no competence to suggest how this should be done, but are encouraged by the success of the Nyon Agreement to believe that the difficulties are not insuperable, and that a firm stand for moral principle would not necessarily involve war.

"There is a real moral case for a repudiation of the use of armed force altogether; but our country has

not been persuaded that it is sound. There is no moral case for building and maintaining armaments without clear moral principles to direct their use. We are anxious lest the recent trend of events should develop into a drift away from all moral principles, and result in an acceptance of sheer expediency as the guide of our action.

"We recognize the paramount obligation of avoiding general war, if that can be done without gross betrayal of principle; but we contend that an even greater evil is involved in international anarchy, which would, moreover, almost inevitably lead to general war.

"We desire, therefore, to reiterate our conviction that the maintenance of international law must, on moral grounds, take precedence of any national interests in the direction of foreign policy, and should be its supreme goal.

"Other points follow from this, including revision of the existing international law and the securing of fair access to raw materials. But of all claims the authority of international law stands first."[1]

This declaration most strikingly affirms the allegiance to this higher law, and urges the moral duty to secure its observance which exists. Its publication was followed by a correspondence in the columns of *The Times* which only served to emphasise how widely the views of the Bishops are shared by the community as a whole. Lord Lothian commented the Bishop's declaration in terms which put the fundamental issue as clearly as it could be put, and which evoked very general support, and an immediate endorsement from the Archbishop of York.[1] Lord Lothian wrote:—

[1] *The Times*, July 7th, 1938.

[1] In *The Times* of July 15th, the Archbishop wrote: "There can be no true reign of international law without an international or federal Government. It is, I am convinced, perfectly true that the root evil is unlimited national sovereignty with its consequence that each nation claims to be judge in its own cause, and the only real remedy lies in a "pooling" of some elements in national sovereignty."

"Most of us feel profoundly the difficulty of finding a moral basis for our foreign policy so well set forth in the manifesto published yesterday by a number of Bishops and other Christian leaders. But I do not think that the signatories probe the difficulty to the bottom or show us a solution. They declare that rather than fall back on considerations of mere national expediency we must be ready to go to war for moral principle and in defence of 'international law,' though they recognize a 'paramount obligation to avoid general war if that can be done without gross betrayal of principle.' That view I believe to be right, so far as it goes, and the people of this country are slowly and reluctantly girding themselves to the point of paying the terrific price of another war, if they become convinced that liberty can be preserved in no other way.

"But the root difficulty is that in international disputes there is always a conflict of moralities and that international law is not at all synonymous with what is loosely called the reign of law. The true reign of law which is the condition of peace, is only established when there is a representative Governmental authority which can enact law on behalf of all the people and change it as required, and which can enforce the law and prevent resort to violence not by war but by police methods. International law to-day mainly consists either of treaties which are contracts between sovereign States with no supernational authority either to change or enforce them, or of rules which, like the rules of the duel, attempt, with ever lessening success, to bring a modicum of decency into the anarchy of sovereign States. To talk about going to war to enforce international law illustrates the confusion of thought which now exists, for the very first object of the 'reign of law' is to substitute police action against the individual for war as the sanction behind law. We have had experience of one vast war fought by a collection of democracies from 1914 to 1918 to defend freedom against autocracy and to

maintain the sanctity of treaties. Most people now feel that while the cause was just the remedy was almost as fatal as the disease, and that a war for the principle of the League of Nations is not likely to produce ultimately more satisfactory results than a war for Woodrow Wilson's 14 points, which included the League of Nations.

" Moreover, in the present anarchy of sovereignties, which the Covenant does not touch, the diplomatic card which Great Britain by reason of its world-wide position, so often is asked to play, if it is always to be faithful to principle, is a card which, if it is taken up, spells world war. To throw down the gage may prevent war or international injustice, but it also, as often before in history, may let loose world war. Yet it is quite certain that morality does not require us to call upon our own countrymen or other people to pay the price of world war to prevent relatively minor injustices, atrocities, or breaches of justice. Mankind is not going to be benefited by multiplying carnage and destruction a thousandfold for the sake of questions which will immediately be swallowed up in the vast and catastrophic issues which will be raised by general war. That is where the conflict of moralities arises and why it is no solution to declare that we ought always to be ready to go to war on moral issues—though admittedly there are times when war rather than retreat is the lesser of two evils.

" The truth is that the real root of all our troubles is the anarchy of sovereignties and that there is no possibility of organising peace or the reign of law or morality except by creating a federal authority, representing all the people, which is able to legislate from the standpoint not of a conflict between national interests but of the well-being of the whole, which alone has armaments which can ensure reasonable freedom for trade and migration, and which can enforce its laws by police action against the individual and not by war against sovereign States. Anarchy not Fascism or Communism is the ultimate enemy,

and whether you are a Conservative, a Liberal or a democratic Socialist it remains true that the only remedy for the wars and power diplomacy and abdication of morality which are inherent in anarchy is some form of common government. It is only necessary to look at Europe with its 25 States, 25 armies, 25 frontiers, and 25 foreign policies to see what is the main fountain of international unrest, unemployment, and the ideological conflict in the world.

"It will be replied, of course, that the pooling of some part of State sovereignty in a new federal sovereignty is wholly impracticable and out of reach. That is certainly true to-day, because politicians and statesmen cannot go beyond what public opinion will support, and public opinion, at present, is being given no lead about the fundamental truth which alone can solve the problem of war. It is still being told by advocates of the League and others that war can be ended without some pooling of the sovereignty which makes anarchy inevitable. But it is, as I think, precisely the task of the Churches to give a lead in matters of this kind, for it is their task to preach what seems 'to the Jews a stumbling block and to the Greeks foolishness,' what St. Paul meant when he said that 'God made of one blood all the nations of the earth.' Personally, I believe that if the democracies of the world understood that the only way of ending world war and the menace from the air was their own willingness to pool enough of their sovereignty to create a common representative Government for their common affairs, even though that Government at first only included the democracies and could not at first establish peace all over the world, they would insist that their statesmen should begin to explore the possibilities of the federal solution. At any rate, this would add a constructive aspect to the otherwise gloomy utterance that we must just prepare once more to repeat the experience of 1914 and hope that something better will come out of it next time."

There were not wanting critics who stressed the difficulties in the realisation of such an aspiration. Thus, Professor C. K. Webster pointed out: (1) that the British Commonwealth has not developed in any of the ways suggested in the pre-War period,[1] and (2) that federation in the United States was achieved among persons owing allegiance to a common sovereign and possessing a common speech and law. These, however, are by no means essential factors for successful federation. In the German Empire there were united States with no common prior allegiance (except to the shadowy Confederation, or, before that, to the Holy Roman Empire) and no common law. The Swiss Federation united citizens of different races, languages, law, and religions, and the Indian Federation has united different races, with different languages, laws, religions, and systems of Government. Should the Indian experiment prove successful, it would add point to the contention of Sir John Fischer Williams, that a world federation need not necessarily contemplate a federation of democracies only. That, too, is a point which will be discussed more fully later.

Objections of a different character were voiced by Dr. Jacks. After sketching the functions of the State in the preservation of peace within a State, he asked:

> "How much of all this is to be reproduced in the rule of law between nations which the law-abiding nations are to enforce? Is it the intention to limit the rule to preventing acts of international violence ("unprovoked aggression") while leaving the multitude of non-violent offences, which provoke the violent, to go on unchecked, or, if to go beyond this, how far beyond? Is the international police to become active only when bloodshed is threatened, attending solely to international cut throats, but having nothing to say to a nation which breaks its contracts, seizes property not its own, defaults in the payment of its

[1] This is a problem which is considered in the next chapter.

debts, poisons the minds of Eastern races with libellous broadcasts about the British Empire, or cruelly persecutes a defenceless minority, and floods other nations with impoverished refugees? And, more especially, does the rule of law between nations lay upon them any obligation analogous to that rule which compels the citizen to pay in the form of taxation for the benefits he enjoys in an ordered society? Is collective security under the rule of law to be given the nations for nothing? Or is it to be supported by voluntary contributions after the manner of a charitable institution? In either case it would be somewhat of a novelty in the history of the rule of law.

"A series of questions parallel to the above might be asked in regard to the "law-abiding nations" who are to charge themselves with the armed defences of international law on the lines approved by signatories of the letter referred to above. By what marks are the law-abiding nations to be distinguished from the non-law-abiding? By their past record in dealing with other nations? Or by their present intentions? If the former, which of them will stand the test? If the latter, who is to be the judge? In their self-estimates it would be difficult to find a nation which is not law-abiding. In their estimates of each other it would be difficult to find a nation which is."

The answers to many of these questions are so elementary that it is a little difficult to believe that they were seriously put. Since, however, the distinguished writer asked for an answer from lawyers, it would seem that he regards the implicit objections as having substance, and a reply will be attempted.

Any closer association of nations must necessarily establish new or strengthen existing *fora* for the settlement of international disputes. An international police force could only operate following decisions of these *fora*, or to prevent an immediate threat of aggression. Not all offences in either international or private law merit forcible police

intervention, being in their nature torts or breaches of contract rather than crimes. For example, States do not now make war upon defaulting debtors—although that is not to say that better machinery for the collection of international debts cannot be evolved. Most of the offences mentioned by Dr. Jacks come within the terms breach of contract or tort, for the settlement of which the Permanent Court already exists, and for some classes of which jurisdiction already exists. A reference to the judgments of the Permanent Court will reveal a good deal of activity under these heads. For others, being in the nature of infractions of international comity, it would seem that no judicial settlement is required, now or in the future. It is for the international crime, of which the chief is the aggressive war, that an International Police Force is required. That it can be created has been demonstrated.[1]

As to payment, even the Covenant of the League lays an obligation upon members to contribute. There is no reason to suppose that any closer association of nations would impose any lesser obligation, nor is the problem of creating machinery whereby execution could be levied against defaulters one of any great complexity. Peace is at least as worth paying for as the risk of war involved in competitive rearmament.

The question relating to the test of "law-abiding nations" reveals a serious misapprehension concerning the nature of the Bishop's manifesto. The manifesto related to any future use of force by Great Britain. Certain well-understood legal obligations inhere in all States; many of them are defined by treaties. The force of this country should only be used, says the manifesto, against States

[1] A number of articles on this subject are to be found in *The New Commonwealth Quarterly*, and in several of the monographs published by the New Commonwealth Institute. Valuable work on this subject has also been carried out by the British Military Research Committee of the Institute, which has drafted a report on an International Strategic Reserve Force, fully demonstrating that there are no insuperable technical obstacles to such a proposal.

violating those obligations. That does not imply that the force of this country *must* be used against every violator. It supplies a negative, rather than a positive test. Lord Lothian, it will be noticed, goes further. He argues that a super-state organisation, with machinery for the revision of obsolete obligations, and an international police force, will involve an obligation upon every member to assist in preserving the peace among members. As Mr. W. R. Bisschop said in reply to Dr. Jack's criticism:

> "An international police force could only exist if it emanated from a sovereign power over and above the nations which could enforce its sovereign will. If, however, various nations have agreed to form a commonwealth or a federation and recognised a sovereign power over and above their own national existence, these are bound at the same time to create a Court of Justice to which disputes *inter se*—should they arise—would be submitted.
>
> "The autonomy left to each member of the Commonwealth or the federation would be supreme for maintaining the rule of law within its own borders and between its citizens and those of other members of the commonwealth or federation. . . .
>
> "The rule of law without a sovereign power to enforce it is devoid of all substance."

Mr. Bisschop also points out that the creation of a commonwealth of nations, even on a limited scale, with such super-national authority, would not in any way impede the realisation of the larger idea of world-wide international organisation.

This manifesto, and the correspondence which followed it have demonstrated how widely the real nature of the problem is now understood in this country. The attack on sovereignty has at last spread from the study to the newspaper. That is probably the most notable advance towards international organisation which has been made since the Covenant of the League was signed.

CHAPTER VIII

The British Commonwealth of Nations from the Standpoint of International Order

The evolution of the British Empire into the British Commonwealth of Nations has involved the solution of a number of problems bearing a superficial resemblance to those which require solution in the sphere of international organisation. There has consequently been a disposition among some British writers and statesmen to suggest that the British Commonwealth might usefully serve as a model for an association of nations. The treatment of one or two of these problems in the evolution of the Commonwealth does not prompt the conclusion that it can serve in any way as a useful precedent in the wider sphere of international organisations. An exhaustive consideration of this question would necessarily require a large volume, but one or two illustrative points will be selected for consideration.

The first point is clearly the recent constitutional development of the British Commonwealth. When self-government was granted in the nineteenth century to those territories which later became Dominions, its full implications were unrecognised. It was regarded as a grant of local self-government, leaving the government of Great Britain supreme and solely responsible for all other policies, especially in the sphere of foreign relations. Slowly, however, the sphere of self-government extended, more especially after the federation of Canada and Australia, and the establishment of the Union of South Africa created federal authorities having control over vast and to a large extent undeveloped territories. When the

ultimate consequences of separatism were at last recognised, at the close of the nineteenth century, there were extensive discussions of Imperial Federation, and of the possibility of establishing a Senate for the whole of the Empire. None of the schemes received any extensive support within the Dominions. All of them seemed to involve a surrender of some of the autonomy which had been acquired, and granting that geographical difficulties were considerable, the decisive factors in the rejection of federation was diversity of local interests, absence of any external threat, and the intensity of the local attachment to political independence. The Boer War, and again, to a greater degree, the war of 1914-18 demonstrated the possibility of common action based on mutual consent in face of a common danger, and the Imperial War Cabinet served as the nucleus of an Imperial Executive. On the whole, however, the war of 1914-18, by serving to emphasise the distinct nature of each Dominion's contribution to the common defence, stressed the growth of national sentiment, as distinct from Imperial sentiment within the Dominions, and the process was in no way retarded by the Imperial Conferences which have been held at regular intervals since the war. If, as has been suggested repeatedly, these Conferences are not formal international conferences, but family meetings, they are assemblies of brothers, whose mother has died. The Statute of Westminster, which completed this movement, has been aptly described as conferring Dominion status on Great Britain. In other words, the mother became translated into the rather spritely younger sister of her own children. So far has this process now gone that, as a distinguished Canadian writer said recently, the Dominions are sometimes tempted to overlook the fact that Great Britain, too, is entitled to Dominion status.

From the constitutional standpoint, therefore, the transformation of the British Empire into the British Commonwealth of Nations has been a process of disintegration from

a unitary State into an association of free communities, united in law merely by common allegiance to the Crown. It has produced private law problems (*e.g.*, in the sphere of nationality and status) of almost intolerable complexity, a number of which are still unsolved, and it has produced no new contribution to the theory of political organisation. To-day, when the most serious dangers once more threaten the security of members of the Commonwealth, there is a greater tendency to listen to suggestions for closer co-operation than has been evident for some time past—a circumstance which is evidenced by the inauguration of unofficial conferences on British Commonwealth Relations —in itself a significant reminder of the cautious manner in which the question must be approached. No one at this late date suggests, however, that anything in the nature of federation is possible, in spite of greatly increased rapidity of communication. The entire emphasis is upon voluntary co-operation, preferably of an informal nature, in spite of the fact that three hundred years of International Law has shown that all hopes of security founded upon such a flimsy basis are false, as soon as identity of outlook amongst the partners is lost.

The question is directly associated with another—that of the desirability, or even the necessity, of common action in external affairs. Prior to 1914, the Empire had one foreign policy, conducted by the Foreign Office in London. One of the effects of the war upon Commonwealth relations was to establish the principle that Dominions may conduct their own foreign affairs, a point which was emphasised by their entry into the League of Nations, the acceptance of mandates by some of them, and the appointment of diplomatic representatives distinct from those of Great Britain. The result has been the evolution of distinct Dominion foreign policies, which are necessarily conditioned by the geographical environment of the Dominions. It is seen, for example, in a particularly clear form in the external relations of Canada, influenced as it

is by contiguity to the United States. Since the war of 1914-1918, this new departure has not been subjected to any test of first-rate importance. Whether it would survive the strain of another European War remains a matter for conjecture.

There has been an entirely similar development in the sphere of Imperial defence, influenced undoubtedly by the evolution of distinct external policies. Prior to 1914, Great Britain was exclusively responsible for the defence of the Empire. If the Dominions chose to assist, it was merely a voluntary effort. The rally of the Empire in 1914 will always remain one of the most remarkable responses to the common danger which have been recorded. The conditions of 1914, nevertheless, will never recur. There is far greater preoccupation in external affairs in the Dominions than was the case before the war, and there is considerable criticism of the policy pursued by Great Britain which is no less formidable because it is frequently based upon an inadequate appreciation of the difficult situation of this country, at once a European power, and the centre of a world-wide Empire. This divergence in points of view has led to a desire in each of the Dominions to build up its defensive forces to a point as far as possible compatible with the difficulties of its situation. As yet this aspiration is necessarily incompletely satisfied, yet already in several Dominions the cry has been effectively raised that the Dominion should look primarily to its own requirements, and not to the requirements of the Commonwealth as a whole. In the last resort, this is the acid test, for similar policies between nations at the Disarmament Conference paved the way for the failure of the League to function as an international administrative organisation.

One other point of some significance in British Commonwealth matters has been the failure to evolve any tribunal for the settlement of disputes between members. The possibilities of adapting the Judicial Committee of the

Privy Council for this purpose have been destroyed by the growth of feeling in the Dominions that the composition and situation of this body affords no guarantee that it is properly acquainted with the background of the Dominions disputes upon which it adjudicates, and the fate of Canada's "New Deal" in the Privy Council in a succession of decisions in 1937 lends colour to this. Accordingly several Dominions have abolished appeals to the Privy Council. All of the Dominions have decided at least to curtail them. It therefore followed that no Dominion was content to accept the Judicial Committee as the final Court of Appeal for the settlement of inter-Dominion disputes, and no one could suggest any satisfactory substitute. Absence of such a forum proved a serious embarrassment in the long drawn out dispute between Great Britain and the Irish Free State. It can scarcely be expected that inter-Dominion disputes can be avoided in the future, and when they do, the requisite forum is missing. Even assuming that such disputes can be settled by informal negotiation or arbitration, absence of such a tribunal emphasises the extremely delicate nature of the legal links which unite the Dominions with Great Britain and with one another. Of course, other and firmer links exist, but so far, no stable community has found it wise to rely on these without the assistance of legal organisation.

There is a further question, mainly of theoretical importance, affecting the relations of the Dominions with this country which has received no final solution—namely, the problem of sovereignty within the Empire. Down to 1914, the orthodox doctrine that sovereignty over the whole of the Empire resided in the King, in the Parliament of the United Kingdom received no serious challenge, even in the Dominions. It received its classic exposition in Dicey's famous work, which failed to consider the awkward problem involved in the claim for sovereignty on behalf of a Parliament of one section of the Empire over the whole.

Post-War developments made the classic theory increasingly difficult to maintain, and the Statute of Westminster has rendered this virtually impossible, for it established absolute equality of status between the Dominions and Great Britain, and even permitted laws of the Dominions to have exterritorial operation. From this, it would seem to follow that the Dominions are now sovereign independent States, united simply by the personal tie of the Crown. Against this, the argument that the equality was derived from a statute of the Imperial Parliament, which cannot fetter its legislative power, and can therefore take away what it has conceded, seems empty formalism, divorced from the realities of political development. The same argument could surely be made for the legislative authority of the Royal prerogative, in competition with that of Parliament.[1]

A sounder line of approach is that of Noel Baker's *Present Juridical Status of the British Dominions in International Law*, in which the distinguished author contends: (1) that in International Law the Dominions are not fully independent sovereign states, since their relations *inter se* are distinct, and are based on a sense of common relationship; and (2) that even the so-called "independent sovereign states" have less sovereign independence than they formerly enjoyed. The final conclusion of this argument is surely that the concept of sovereignty is itself of greatly diminished importance to-day, beside the actual facts of behaviour, whether inside the Commonwealth or outside it.

Even granting this conclusion, however, the fact remains that the Dominions are individual entities with far greater freedom of action, even in the international sphere, than they possessed prior to 1914. The purely legal links which bind them to Great Britain are trifles compared with the non-legal links which are to-day so frequently

[1] A similar line of thought is the view propounded by Jellinck and others in their theory of the voluntary self-limitation of the state in assuming international obligations. The fallacy of this theory has been demonstrated by Kelsen.

stressed. First among these is probably the common political outlook—an acceptance of democracy not so much as a form of government as a way of life. Other links of importance are the Common Law; common race (though this is not true of all the Dominions), and a common outlook upon certain world problems, and above all, fundamental economic and financial links.

The striking thing, however, is rather that with all these common links, it should have been found desirable to evolve so much individual freedom of action. Where many or all these common links are absent, to what extent can the British Commonwealth furnish a useful pattern for international organisation? In the past, divergences in outlook have not been suffered to become acute because the Dominions relied upon Great Britain for defence against external aggression, because they were small communities preoccupied with their own development rather than with external affairs, because the separation of Dominions populations from the common stock was very recent, and above all, because the Dominions needed British capital in liberal measure to develop their extensive resources. As these reasons for a common outlook steadily become less cogent, what guarantee is there that inter-Dominion relations will be a more vital relationship than the relations of the United States with Great Britain? The conclusion of the matter seems to be that the relations of the Dominions and Great Britain *inter se* have changed and are changing swiftly, and there is as yet no clear indication what their ultimate form will be. With so much that is experimental, so much that is clearly transitional, it would be perilous in the extreme to regard the harmonious relationships between members of the British Commonwealth as in any way a guide to the form which an international society should assume, since, as has been shown, these relationships depend on factors peculiar to the Commonwealth. This danger is the more pressing since, not only in the writings of some publicists but also in the

speeches and acts of British statesmen, there has been evinced a desire to regard the two problems as similar. The abandonment of Article XVI, and the emphasis in the speeches of Lord Halifax and Mr. Chamberlain upon peaceful and voluntary co-operation among law-abiding nations have been recent illustrations of this tendency.

CHAPTER IX

THE INTERNATIONAL COMMUNITY

Is there an international community whose interests are paramount to those of the State, and which is the highest achievement of which man, as a political animal, is capable? The mediaeval philosopher had no doubt upon this point. Christendom was a unity, the link between man and man, irrespective of frontiers being the Christian discipline imposed by the organisation of the Church. There was only one community, though there were many rulers who disturbed the peace which should prevail. The mediaeval world never surmounted the problem of organisation. Must modern civilisation perish for the same cause? To this, the letter of Lord Lothian, which has already been mentioned,[1] supplies the answer. One paragraph in particular requires repetition:

> "The truth is that the real root of all our troubles is the anarchy of sovereignties and that there is no possibility of organising peace or the reign of law or morality except by creating a federal authority,

[1] And c.f. Archbishop Temple: "The trouble is that we have as yet no vivid sense of the community of nations. We know in our minds that science has made the civilised world a single fellowship; we know that our commerce is international, science is international, to a very great extent culture is international. But we do not *feel* internationally as yet. In such feeling there is no loss of patriotism, nor of national character. A Scotsman is quite sure he is not an Englishman, but both together feel the community of life in Great Britain. So we must learn to feel the community of Life among civilised nations. So long as the League of Nations is felt to be only a means of diplomatic discussion between utterly separate States, each pursuing first its own interest, it cannot function effectively in any great crisis." *The Christian and the World Situation*, p. 11.

> representing all the people, which is able to legislate from the standpoint not of a conflict between national interests but of the well-being of the whole, which alone has armaments, which can ensure reasonable freedom for trade and migration, and which can enforce its laws by police action against the individual and not by wars against sovereign States. Anarchy not Fascism or Communism is the ultimate enemy, and whether you are a Conservative, a Liberal or a democratic Socialist, it remains true that the only remedy for the wars and power diplomacy and abdication of morality which are inherent in anarchy is some form of common government. It is only necessary to look at Europe with its 25 States, 25 armies, 25 frontiers, and 25 foreign policies to see what is the main fountain of international unrest, unemployment, and the ideological conflict in the world."

It has been shown how, even before the war, a number of problems could only be solved by the creation of an international administration.[1] Such activities are generally termed humanitarian, thereby implying, perhaps, that others are less directly bound up with human welfare. But war experience has shown, however, that the welfare of one state is inseparably bound up with the welfare of all, and that attempts to create a self-sufficient national economy, though they are widely evident to-day, seem necessarily to involve as a consequence a serious decline in the general standard of living, at any rate for highly industrialised communities. The problem of the supply of raw materials, of the distribution of populations, and of the conditions of labour cannot be solved within the borders of a single community. They must be solved universally or not at all. So much has been partially realised in the efforts undertaken by the League of Nations to restore Germany, Austria and Hungary to financial stability after the war, in the abortive Economic Con-

[1] ante.

ferences, in the Broadcasting Convention of 1936, with its provisions designed to promote peace and understanding between nations, and in modern discussions of the problem of raw materials, especially its bearing upon colonial possessions. The existence of trusteeship on behalf of the native community is recognised in the mandates system of the League, and there is also some recognition of the interest of the international community as a whole in the description of mandates as "a sacred trust of civilisation" and in the assurance that there shall be equal opportunities for the trade and commerce of other Members of the League. Since the establishment of the League Covenant, the opinion has gained ground that the mandates system might profitably be extended to other purely colonial possessions, or alternatively that there should be a joint administration of all African colonies by the leading European powers. Both these proposals are admittedly attended with difficulties, more particularly the second, which involves the selection of those powers which are most competent to undertake colonial administration. Nevertheless, in both proposals there is a recognition of the priority of the interest of the international community as a whole over that of the individual powers under whose control the Colonial possessions may be. Such proposals offer a greater guarantee of international peace than the spectacle of sated imperialisms side by side with vigorous nations whose ambitions are unsatisfied, either completely or partially, and they do something towards avoiding the difficulties which arise when new claims by strong Powers are urged with all the resources which are now at the disposal of the modern state.

There are many other problems affecting international well-being which embrace serious threats to peace unless investigated from the standpoint of the international community as a whole. Successive inventions, whether of objects used primarily for peaceful or for war-like ends, create problems of unemployment, or of counter-activity,

which require an international solution, while the whole problem of the unfriendly use of propaganda, whether by the Press, by broadcasting, by the cinema or by other means, is a problem which can obviously never be solved on a nationalistic basis. These are comparatively new problems which have emerged in an age when international communication by travel, by the spread of education, and by the rise of great culture movements which transcend frontiers have thereby greatly increased the complications of international intercourse. To take but one or two examples, the use by Italy of anti-British and anti-French broadcasts to foment trouble among Arab subjects of both nations, and the campaign of misrepresentation and vilification employed by Germany against Czechoslovakia in 1938, can scarcely be regarded in any other light than as a threat to international well-being, the dangers of which must survive and intensify so long as problems of international intercourse are investigated from conflicting national viewpoints, where permanent progress for the international community as a whole is subordinated to the necessity of securing some temporary national gain.

There is, furthermore, an even graver problem. The last few years have seen the approach towards the completion of the unification of the German " race " in Europe. That unification has been characterised by repeated threats of wars, by blusterings on the part of German leaders which spring, no doubt, in part from a sense of past injustices, but which have produced immediate and opposite reactions in the countries threatened by those pronouncements, and which have given rise to widespread fears of further expansion. In the last resort these fears have been translated into counter-alliances, determined to challenge this new German menace by war. Successive threats to the independence of other nations by ambitious and vigorous races have been decisively defeated in the past, and if one thing can be predicted for the future with any certainty, it is that any similar threat will be decisively

defeated again. Even were it successful, it would be essentially a temporary phase. The effort of control would exhaust the conqueror's energy, leaving the overrun nationalities to recover their freedom as opportunity offered. The disintegration of Austria-Hungary, the failure of successive conquests of China to achieve permanence, and the collapse of the Napoleonic system in Europe are but a few of the examples which spring readily to mind, while the recovery of self-government by India in our own days shows conclusively that if conquest is to be anything more than ruthless oppression, its very enlightenment contains in itself the source of its own abdication. If the unending misery which is involved in the attempt of one people to impose its own philosophy of life upon the less powerful or less numerous populations which lie in its path is to be avoided, then it is essential that co-operation should replace a competition which has become steadily more ruthless with each successive advance of mechanical science. So much has probably been generally realized; but it has perhaps not been equally appreciated that this will involve no less than a renunciation by States of so much of their authority as is necessary to establish an all-powerful international authority. The whole arguments of opponents of an International Police Force has been based upon the assumption that States will retain their armies and navies and will place quotas at the disposal of a central body in time of emergency. That system, however, wrecked the German Confederation as it existed between 1815 and 1867. Nothing less than the replacement of all armies and navies, beyond what are necessary for the preservation of internal order, by an international force will give the security required. If the United States could only construct an army for defence by securing contingents voluntarily offered by the separate states, it would be at the mercy of any small, determined state which chose to attack it, instead of being the almost invulnerable democracy which it is to-day.

Nevertheless it has been assumed that the League would grow as a powerful, or irresistible, factor for peace with even less provision for emergencies. No more mischievous doctrine has been propagated in modern times.

CHAPTER X

The Minimum Conditions of International Order

That the present system of power politics, backed by increasingly formidable national armaments, provides no effective guarantee of peace was abundantly evident before the Czechoslovakian crisis of 1938 demonstrated how intolerable diplomacy at the point of the bayonet had become. When the effect of war was to place the comparatively small armed forces of nations in opposition to one another, there may have been some justification for national egotisms to find outward expression in wars of aggrandisement. To-day, when even in times of "peace" the whole of a nation's economic life is dislocated for the purpose of building up vast armaments whose multiplication can only bring about national bankruptcy, and which, far from bringing security, only increase the probability of war, threat of war cannot fail to touch every member of a national community, since all alike are exposed to a common peril in the event of hostilities. For this reason, and notwithstanding the failure of the League to preserve international order, the last few years have seen a remarkable growth in the desire to establish an international organisation sufficiently powerful to transform peace from the negative condition of "not-war" into the positive state of co-operative international well-being which the human mind insists it ought to be. Of this growth, the bishops' manifesto, and subsequent discussion of it in *The Times* are two examples. It is also realised, however, that the transformation from State rivalry into an international commonwealth is not one which can be achieved by immediate formulation of ideal

constitutions. It may be the product of a long period of evolution, or it may be the consequence of a war even more disastrous in its incidents and effects than the war of 1914-1918. One thing, however, is certain—We are learning to think internationally rather than nationally, and if the state is to achieve the maximum good of which it is capable, and if it wishes to enjoy the loyalty of its members, many of whom are already conscious of another, and wider loyalty, it will have to appear in the future as a pillar of international security, and not as an obstacle to it.

Whatever the process of change may eventually prove to be, however, it is necessary to consider some of the outstanding problems involved, and in the present chapter an attempt will be made to discuss briefly one or two of the most important. In the first place, a fundamental change must be made in the attitude of the international lawyer towards war. It has already been indicated that the "orthodox" International Law, as it existed between 1648 and 1918 rationalised war by regarding it as the "litigation of States," and this attitude was in no way affected by the growth of arbitration, or even by the establishment of the Permanent Court of International Justice. The assumption has been that in the last resort, on matters vitally affecting the life of a State, it must necessarily be the judge in its own cause, and is entitled to enforce that judgment by waging war upon its adversary.[1] This is not justice, but its negation. If taken to its logical conclusion it leads to the perpetuation of quarrels through the natural process of the defeated State seeking an opportunity for revenge, and the equally natural determination on the part of the conqueror to prevent an

[1] It is however, interesting to notice that in the advisory opinion of the Permanent Court in the Mosul Case, delivered on November 21st, 1925, the Court observed: "The well-known rule that no one can be judge in his own suit holds good." Apparently, therefore, even in the existing system there exists a tendency leading beyond this admittedly unsatisfactory position.

opportunity for revenge occurring. What is required from the international lawyer is an unqualified pronouncement that the employment of war for the achievement of the selfish aims of a state is an offence against the international community as a whole. "If the law of nations is to be binding," said Mr. Elihu Root in 1915, "if the decisions of tribunals charged with the application of that law to international controversies are to be respected, there must be a change in theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilised nation to have the law maintained and a legal injury to every nation." The issue has never been more clearly put, and to-day there is far less justification for legalising warfare than there has been at any period of human history, for all the signatories of the League Covenant, as well as the signatories of the Briand-Kellogg Pact have agreed to renounce wars for the achievement of national policy in their relations to one another. There has been some disposition to regard the Kellogg Pact as so much waste paper, and indeed several signatories, and notably Japan and Italy, have ignored their obligations under it. That, however, is not the view of the United States. On May 28th, 1938, Mr. Cordell Hull declared of it: "That pledge is no less binding now than when it was entered into. It is binding upon all parties. We cannot shut our eyes to the fact that any outbreak of hostilities in any part of the world injects into world affairs the factor of general disturbance. The ultimate consequence, no man can foresee, but it is liable to afflict all nations with incalculable and permanent injuries.[1] The acceptance by all nations of peaceful methods of settling international disputes therefore remains one of the

[1] On the general purpose of Mr. Cordell Hull's policy, see G. Schwarzenberger, Transactions of the Grotius Society, 1938, p. 147, *An American Challenge to International Anarchy.* An Analysis of the U.S. Secretary of State's Declaration of July 16th, 1937, and of the Replies of Sixty-one Governments.

cardinal objects of the foreign policy of the United States." The identity in point of view between Mr. Cordell Hull and Mr. Elihu Root is quite plain.

The acceptance of such a principle immediately raises the problem of the employment of force against a law-breaker. During the discussion of the application of sanctions to Italy during the Abyssinian War, Lord Baldwin, then Prime Minister of England, declared that: "Sanctions mean War." In the last resort this is unquestionably true where the offender is a first-class Power, although it must be emphasised that the danger of war diminishes directly in proportion to the strength of the forces, which are likely to be turned against a law-breaker, coupled with the efficiency with which those forces can be mobilised against the law-breaker. Nevertheless, it is unquestionable that in the transitional stage from power politics and the pursuit of selfish national interests to co-operation for the common welfare, states which have ranged themselves on the side of international organisation, will have to face this possibility squarely. Failure to think out its implications clearly was responsible for the lamentable breakdown of the experiment with sanctions against Abyssinia. There are several possible arguments which have been advanced against the adoption of such a course which, incidentally, from the wording of Article XVI of the Covenant and the accompanying memorandum was quite plainly the object of the framers of the Covenant. One possible argument is that the use of force for the settlement of international disputes is always wrong, and it is just as much wrong if done in the name of an international authority as if done on behalf of a group of states, or even on behalf of a single state. Such a point of view has been advanced by many distinguished persons, and in England by Mr. George Lansbury, but it is not one which makes any appeal to the majority of persons. In particular, it was repudiated by Archbishop Temple in the speech to which reference has already been made.

It seems, in fact, to rest upon a fallacy, since it assumes that there is some kind of fundamental distinction to be drawn between the employment of force by a state authority to preserve internal order, and the employment of force by an international authority to preserve order in a wider field. Such an argument seems to defy at once logic and the plain trend of human development towards association in larger units, or, if internal force also is rejected, it leads directly to chaos. To offer the other cheek to the offender is unfortunately still in human relations to encourage, and not to punish him. The final answer, as it seems to the present writer, has been given to all such arguments by the courageous words of Archbishop Temple in a broadcast address on September 1st, 1935, when he said with reference to the application of sanctions against Italy:

> "Now it seems to me that those who call upon us, on the ground of our Christian faith, to refuse all share in the exercise of such force as is employed between nations, are forgetting this contribution of law to the Christian life. This is a sphere of conduct where unselfishness is far harder than it is in the relationships of individuals, yet these people call Christians, and expect Christians to call the world to a height of moral achievement which individuals reach only by long discipline. I see no reason to expect that nations will learn to act towards one another in the spirit of the Gospel until they have been brought by means of law, supported as law should be by sanctions, to a reasonable state of justice. Love cannot be enforced or organised; but justice, at least in outward action, can be both organised and enforced. A nation consists of its citizens; it is not something that exists apart from them. But a nation will not become unselfish only because its citizens are personally unselfish. What is needed is that they should become unselfish in their capacity as citizens—that is to say, in their contribution to the conduct of the nation. And that is very

difficult. The peculiar problem of international morality arises from the fact that the State can attach its citizens in loyalty to itself by appeals both to their generous and to their selfish impulses. The young Englishmen whose patriotism is stirred gives himself wholeheartedly to the service of his country. That is generous and splendid. But it is *his* country to which he gives himself, and his real self-sacrifice may be mixed with a desire to impose his country's will upon another, and this is a mere extension of self-interest or self-assertiveness. The huge strength of nationalism is derived from this double appeal; it harnesses people both by the best and by the worst elements in their nature. So there is a wholeheartedness in patriotic devotion that we do not see elsewhere by . . .

"The outlook on life which made the national State completely sovereign and exalted patriotism as the highest virtue led to the Great War and to the evil Peace which followed it. All who remember the August of 1914 know that what fermented the spirit of our people as they entered the war was indignation at the violation of Belgium and the duty to right a great wrong; but all who know anything of history also know that even apart from any claims of Belgium we should in fact have entered the war to prevent any nation from establishing an absolute preponderance in Europe; and even the perfectly sincere and chivalrous feeling for Belgium must be balanced by the permanent policy never to let Antwerp fall into the hands of a major power. Napoleon knew all about that. The concern for justice was perfectly real; but political self-interest was also active. When the war was over our country sincerely desired, and has learned increasingly to desire, an organisation of international life which may promote international justice, and the settlement of disputes without recourse to war. We have therefore welcomed the formation of the League of Nations, and have desired that it should function effectively.

"A situation has arisen not altogether unlike that which arose when Japan sent armies into Manchuria, but very much nearer home. One State, being a member of the League, threatens another State, also a member of the League. In the case of Manchuria the League pronounced a formal and solemn censure on the aggressive State, but took no further action. It was very difficult for the nations composing the League to take effective action; if America had been a member that might have affected the situation. But now a State which is an honoured member of the European family threatens a similar course. If the League takes action, that may lead to war—or at any rate to fighting. I make that distinction because for the League to employ force against an aggressive member is no more "war" in the proper sense of the word than a baton charge by the police against a mob engaged in destruction is a riot on the part of the police."[1]

There is, however, a totally different argument which has been advanced against the organisation of force to suppress a wrongdoer, and that is that it will involve member-States in wars in which they have no direct interest, and they will be turned, in short, into universal busybodies. This argument which has been repeated *ad nauseam* in certain sections of the daily press, depends upon two distinct fallacies. The first is that the organisation of force by a collectivity of law-abiding states will be insufficient to deter a wrongdoer. It is quite clear that no single country either should or could, undertake the rôle of a universal policeman. So long as the majority of states, however, are in favour of the peaceful settlement of international disputes and are opposed to wars of aggression, so long will the prospects of the law-breaker become perilous in the extreme. When they have ceased to be perilous, we shall have returned to international anarchy.

[1] *The Christians and the World Situation*, pp. 8-10.

The conception of a world-wide obligation to the League Covenant to enforce respect for law has unfortunately proved in recent years too high an aspiration. There has been a general retreat from Article XVI, and the obvious result has been a general impairment of national security. This in itself demonstrates the fallacy of the argument that individual nations can remain unaffected by threats to world peace, no matter from what quarter. The policy of newspapers in advocating that Great Britain should abandon Article XVI and look to her own security were avowedly based upon a desire not to see Great Britain entangled in a war upon a Central European issue. The fundamental unsoundness of such an attitude was sufficiently demonstrated by the prolonged Czechoslovakian crisis, but it received even more striking repudiation from the pronouncements of President Roosevelt and Mr. Cordell Hull during the same crisis. Both statesmen demonstrated that the threat of war involved in the menace to Czechoslovakia's integrity was also a matter of direct concern to the United States.

Even admitting this, however, it is still arguable that it is putting nationalism rather high to expect, say, Peru, to fight for the territorial integrity of Abyssinia—or of Czechoslovakia. Directly, it is true that the interests of Peru are not bound up with the maintenance of the integrity of either of these states, although ultimately, violation of the integrity of one small State cannot fail to have adverse effects upon the interests of all other States. It may be, therefore, that for the present only we require an extension of the concept of regional settlements, with guarantors of the peace who will be directly responsible for the maintenance of order, coupled with the imposition of economic sanctions by all other nations less directly affected. Ultimately, in a protracted dispute, this might involve actual participation in the struggle by all states, but the threat of this in the background, coupled with the active intervention of the immediate guarantors, would

be a potent force for peace which no state could afford to ignore.

Such a system, and its development by such institutions as permanent regional councils at once raises the argument which has been widely propounded in expansionist countries: Would it not stabilize the *status quo*, and so favour the Powers already sated with possessions? This, of course, has been the stock argument which the dictatorships have advanced against the League in its present form. It has been an exaggerated argument, undoubtedly, for the League mandates system, and Article XIX with its provision for the reconsideration and modification of obsolete treaties, might have proved valuable starting points for extended international co-operation. Still, the dictatorships have emphasised the fact that all problems in the international sphere cannot be solved by an appeal to law, even if administered by a tribunal of such high repute as the Permanent Court of International Justice. There is a wide area beyond that of the determination of rights and the interpretation of treaties in which principles of equity must function, free from the restrictions imposed by the letter of the law—a law, be it remarked, which necessarily sanctifies acquired rights. Such an area is at present unexplored because no nation is prepared to sacrifice a right at the bidding of a neutral tribunal, since it would obtain no corresponding advantage, and generally acceptance of such a procedure would strengthen a potential future rival. Recognition of this makes still more imperative the necessity for the replacement of the competitive by the co-operative principle in external activities, and in particular it emphasises the need for an international outlook upon the whole problem of frontiers, colonies and raw materials. An extension of the mandates system, with guarantees for third parties, or a system of international administration is badly needed in many of the present undeveloped areas.[1]

The evolution of regional committees and international

[1] See e.g. Dunn, F.S., *Peaceful Change*.

colonial administrations would involve no violent dislocation of the existing life of states. Indeed, it would be in line with modern tendencies in international affairs, and regional enforcement of order by interested states, in the present state of international politics, seems to have more chance of acceptance than a mere general guarantee, while the existence of such a system would go a long way towards inducing states to accept the more general obligations to enforce economic sanctions, inasmuch as this would be simply an auxiliary to the more limited guarantee. Nevertheless if the Assembly of the community of nations is to be more than a diplomatic forum, it seems essential that it should be based upon some form of popular representation, whatever may be the composition of the executive bodies. Finally, it seems to me imperative that majority decisions of the Assembly in respect of sanctions must be directly binding upon individuals, even though the Assembly were denied a more extended legislative competence. Such an acceptance of the primacy of International Law, even upon one special topic, and even if enforceable only in the local courts, would not only be a guarantee of the general binding force of sanctions, but it would also go some way towards developing that consciousness of international solidarity which must emerge if peace is to be based upon a firm foundation. If, however, this legislative competence were similarly extended to the control of the arms traffic, still another important step forward would have been achieved.[1]

There remains only one other question for consideration, and that is the problem whether for an effective international organisation it is necessary for all the states who

[1] At present, where municipal law and international law conflict, municipal law has precedence. To enforce the primacy of international law would require constitutional modifications in all States. Such modifications ought not to be impossible of achievement if the international legislation for which much change is designed is limited in scope.

uphold it to have a similar political structure;[1] whether, in short, they must all be democracies. It would appear that there are two distinct questions bound up in this problem: (1) the question of formal structure, and (2) the question of national outlook. The question of formal structure, it is suggested, is a superficial one. There is no inherent rightness in one form of government as compared with another, and if the League which was established in 1919, was given a democratic appearance, that was because in 1919 it was universally assumed that the future development of civilised countries would necessarily be towards full democratic institutions. The record of post-War years has shown that such a consequence is by no means inevitable, and while problems of organisation would obviously be rendered more complex if states of different political structures co-operated, such problems would be by no means insuperable. The question of national outlook is, however, a far graver one. It has been shown in an earlier chapter[2] that the totalitarian states have shown a cynical disregard, not only for the express rules of "orthodox" International Law, but for such underlying assumptions as respect for law, pledged word and respect for the separate existence of other States, especially if such other States are founded upon different political ideals. Such infractions of international morality are perhaps even graver than frequent threats of force, since in the latter case it can be argued (as it has been argued) that such appeals are merely expressions of impatience at the existence of a system which the totalitarian state believes to be hostile to its amplest functioning. In a letter in *The Times*,[3] Sir John Fischer Williams wrote:

[1] On this question, of W. Friedmann, *British Year Book of International Law*, 1938, p. 118 *et seq*; *Modern Law Review*, vol. II., p. 194 *et seq*.

[2] Chapter IV.

[3] June 7th, 1938.

> "That we as a nation should seek to promote justice, should abide by the rules of international law, and should avoid being judges in our own cause if and whenever the judgment of third parties can be had—these are, we may hope and believe, cardinal principles of our policy."

The entire literature of the totalitarian States may be searched in vain for an expression of similar ideals, and in many of the published utterances of totalitarian statesmen they are expressly repudiated.

This, then, is the ultimate issue. If the totalitarian States are prepared, with other States, to renounce so much of their national egotism as will permit the construction of an orderly and effective international Government, different forms of Government are no more a bar to association than differing languages. If, on the other hand, they are not prepared to renounce war as an instrument of national policy, if they are not prepared to accept third-party judgments, and to substitute co-operation for competition, pacts with them are dangerous delusions, since they merely cover a cleavage in point of view which is too fundamental to be bridged; and if such, indeed, were the case, those states who are prepared to accept the principles which Sir John Fischer Williams has defined, as the guiding principles of their policy could do no more than band themselves together for self-defence against a threat which would then be implicit in the very existence of totalitarianism.

APPENDIX

THE NEW COMMONWEALTH INSTITUTE

Founded 1934

An International Institute for the Study of Fundamental Principles of International Relations and Research into the particular problems of International Justice and Security.

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